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Supreme Court of the United States

October Term, 1920

No. 189

IOWA ELECTRIC COMPANY,
Appellant,
vs.
CITY OF FAIRFIELD, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA

APPELLANT'S BRIEF AND ARGUMENT

John A. Reed, William Chamberlain and Ralph Maclean,
Attorneys for Plaintiffs, Appellant.
X. C. Nady and Ralph Munro,
Attorneys for Defendants, Appellees.

STATEMENT OF FACT

There is but on issue shown by the record as follows:

Has a city council authority under the statutes of Iowa, hereinafter referred to, (which are the only

statutes pertaining to the subject of gas franchises or rates) the right to enter into a contract with a public utility Company, furnishing gas service, fixing rates to be charged for said gas service by said company for a definite period of time, and which rates the company is bound to observe, even if confiscatory; said statutes being Sec. 720 and 725 of the 1913 Supplement of the Code of Iowa appearing on Pages 20, 21 and 22 hereof.

The facts as disclosed by the records are as follows:

The Defendant-Appellee City is a municipal corporation, organized and existing under the laws of the State of Iowa. The Plaintiff-Appellant Company is a corporation organized under the laws of the State of Iowa, carrying on the business of furnishing gas to the said city and its inhabitants under a twenty year franchise, authorizing it so to do, granted to Plaintiff's assignors by Ordinance Number 192 of said city, passed and approved at a special election January 30, 1917, (Record P. 16-20 inc.) and said ordinance was duly accepted by Plaintiff's assignors. (Record P. 41.)

All of the provisions of said franchise referring to the subject of rates in any manner is contained in Section 3 thereof. (Record p. 17-18) which is as follows:

Section 3.

"The gas company in consideration of the rights, privileges and franchises herein granted

to it, agrees to and shall furnish the inhabitants of the city, gas for lighting, heating and other purposes.

'On the bills rendered for monthly consumption, the rates shall be as follows:

'For the first 3,000 cubic feet, $1.375 per thousand cubic feet; for the next 3,000 cubic feet, $1.325 per thousand cubic feet; for the next 6,000 cubic feet, $1.275 per thousand cubic feet; for the next 6,000 cubic feet $1.20 per thousand cubic feet; for the next 6,000 cubic feet, $1.10 per thousand cubic feet; for the next 6,000 cubic feet, $1.05 per thousand cubic feet;

'For all consumption over 30,000 cubic feet $1.00 per thousand cubic feet, provided, however, the gas company will be allowed to charge a penalty of five cents (5c) per thousand cubic feet if the consumer fails to pay his bill at the office of the gas company on or before the tenth (10th) day of the month succeeding that for which the bill is rendered. Prepay meters shall be installed on request.

'The said gas company is also authorized to charge and collect the sum of twenty-five (25c) for a minimum amount of gas used on each meter installed, and until written notice has been given to the company by the owner of the premises of the customer to remove the meter from the premises.

'The rates which grantee is entitled to charge for service from and after three (3) years after

the acceptance of this ordinance shall be such lawful rates as are fixed by the body authorized to establish rates by the statutes of Iowa."

That the plaintiff charged for gas service furnished by it at and in the city of Fairfield in accordance with the rates provided in said Section 3, from the date it commenced to furnish said service, to-wit, about March 1, 1917, up to the 30th day of April, 1918, (Record p. 6) and placed its plant in good operating condition and operated it carefully and economically during said time. (Record p. 6). The rates charged did not and would not produce sufficient revenue to pay operating expenses, taxes, and depreciation, and leave any sum whatever for a return to plaintiff upon the fair and reasonable value of its property used in furnishing said service. Upon ascertaining said facts, plaintiff presented to the council of the said defendant city and its individual members statements of the earnings and operation of its gas plant for the months of January, February, March and April, 1918, showing said facts, and petitioned said council to take such action as would authorize it to charge higher rates for said gas service and which rates would furnish a gross revenue sufficient to pay operating expenses, taxes, depreciation and a fair return of net profit upon the fair value of its property used in furnishing said service—that is, a reasonable rate—but the council did not grant said application. That thereafter on or about May 1, 1918, plaintiff forwarded to each

of its gas customers a notice, advising them that said rates were not remunerative and were confiscatory; of the causes therefor; and that the Company would bill all gas service furnished after May 1st, at $1.60 per thousand cubic feet. Thereupon the city council of the defendant city at its regular meeting held May 16, 1918, determined to start proceedings against the plaintiff to restrain it from raising the gas rates from $1.375 to $1.60 per thousand cubic feet. (Record p. 8) Plaintiff then brought this action to restrain and enjoin the defendant city, the mayor and the members of the city council, as officers of said city and as representative citizens and tax payers of said city and customers of the plaintiff, from attempting to enforce the rate provisions of Section 3 of said Ordinance No. 192, alleging that the enforcement of the ordinance rate would be a confiscation of its property in violation of Section 1 of the Fourteenth Amendment and of the Fifth Amendment of the Constitution of the United States and of Sections 9 and 18 of Article One of the Constitution of the State of Iowa, and that the amount in controversy greatly exceeded the sum of Three Thousand dollars, and praying that pending the trial of the said cause on its merits, and the entering of judgment and decree, that a temporary injunction issue, granting the aforesaid relief, which application for temporary injunction was duly allowed on terms and issued as prayed. On the 24th day of May, 1919, the defendant filed an amended and substituted answer, in two counts.

In Count 1, they alleged the passage and adoption of Ordinance No. 192, its acceptance by plaintiff's grantors, and assignment to plaintiff. (Record p. 41), and further:

> "That the City Council of the said City of Fairfield, Iowa, is .... now establishing, and has not since the granting of the said franchise and its acceptance, established, or attempted to establish, any rate other than as provided and agreed upon in said franchise."
>
> "That because of the foregoing facts, the rates fixed in said franchise for a period of three years from the date of acceptance thereof constituted one of the conditions upon which the said franchise was granted, and the acceptance of said franchise by the said Dows, Smith and Reed, made said franchise a valid and binding contract for the rates fixed therein until the expiration of the said three year period, unless sooner changed by the city council under and by virtue of its powers to fix and regulate rates as provided by law."

Count 2 is a denial that the rates fixed by Ordinance No. 192 are confiscatory, and that they do not afford to plaintiff a "reasonable return upon the amount of money invested in said project." (Record p. 43).

Afterwards the said case, by order of court, was duly set down for hearing and argument upon the

question as to the sufficiency of the defense pleaded in the first count of the answer, that even if the rates were confiscatory, the plaintiff was not entitled to any relief, because the rates were fixed by the franchise ordinance, which had been accepted by plaintiff's grantors, thus contituting a contract between the city and complainant, fixing its rates to be charged for gas in Fairfield for three years after the acceptance of the franchise.

After argument by counsel on the 25th day of June, 1919, the court filed in said cause a memorandum and decree (Record p. 43, 44 and 45) holding:

> "That the rates complained of by the plaintiff were in fact fixed by contract of the parties as alleged in said Count of said Answer, and that said rates are valid and binding upon the plaintiff, regardless of the claim in plaintiff's petition that the same are confiscatory, and that in view of such contract rates, the facts stated in the bill of complaint and amendments thereto, entitle the plaintiff to no relief; such rates being fixed by contract binding upon the plaintiff, and that for this reason the plaintiff is not entitled to any relief herein, and its bill of complaint is dismissed. The plaintiff excepts."

Afterwards on the 15th day of August, 1919, the plaintiff filed its petition for appeal (Record p. 47 and 48) and on the same date filed its

ASSIGNMENT OF ERRORS

On which it now relies as follows, (Record 48-9):

"Second. Because the court erred in holding that the maximum rate as set forth in the ordinance granting complainant's franchise was and is a rate established by contract between the complainant and the defendant city for the reason that the said rate provisions contained in said ordinance were and are legislative acts of the city of Fairfield passed and adopted pursuant to the authority granted to said city under the statutes of the State of Iowa and particularly under Section 725 of the Code of 1897 as amended.

"Third. Because the court erred in holding that the complainant company was bound as by by contract to render service within the defendant city at the maximum rate fixed in said ordinance granting complainant its franchise for the reason that the defendant city of Fairfield had no authority whatever under the Statutes of Iowa to regulate complainant's rate of charge by contract but on the contrary had full and complete power and still has full and complete power to regulate said rates by legislative action and the provisions of said ordinance fixing the rates of charge of the complainant company are and should be held to be legislative enactments governing rates passed and

adopted pursuant to the power of the defendant city to so regular rates.

"Fourth. Because the court erred in declining and refusing to hold that the provisions contained in the ordinance granting complainant its fraichise were legislative provisions enacted pursuant to the statutes of the State of Iowa and as such subject to attack under the Constitution of the United States, provided the rates therein named were confiscatory in character.

"Sixth. The Court erred in its final decree in holding that the ordinance in controversy and the acceptance thereof by complainant constituted a contract as to rates for three years, notwithstanding that said ordinance by its terms undertook to fix rates for the terms of three years, contrary to and in violation of the Statutes of the State of Iowa and particularly of Section 725 of the Code of 1897 and amendments thereof.

"Seventh. The Court erred in its final decree in holding that the maximum rates fixed for a period of three years in the ordinance which contained complainant's franchise were binding for the full period of three years even if during said period of three years said rates became confiscatory for the reason that the only power which cities possess is that conferred by Section 725 of the Code of Iowa and amendments thereof, which is a continuing power which can only

be exercised by and through legislative enactment of the council, not by agreements."

On the 15th day of August, 1919, the court made an order allowing said appeal. (Record p. 51) On the 29th day of September, 1919, the plaintiff duly filed its bond on appeal in compliance with said order allowing said appeal, (Record p. 50-52) and having complied with the provisions of the law governing the taking of appeals, duly perfected its appeal to the supreme court of the United States.

DIVISION ONE

IN THE ABSENCE OF EXPRESS STATUTORY AUTHORITY A MUNICIPALITY HAS NO AUTHORITY OR POWER TO CONTRACT WITH A PUBLIC UTILITY CORPORATION FIXING RATES TO BE CHARGED THE PUBLIC FOR SERVICE.

(a) The power of municipalities to contract must be conferred in express terms by act of the legislature or indispensible to the exercise of a power expressly conferred by act of the legislature.

Heins vs. Lincoln, 102 Ia. on p. 77.
Town of Akron vs. McElligott 147 NW 733 on p. 774.
Ottumwa Railway & Light Co. vs. City of Ottumwa, (Iowa) 178 NW 905.

Mitchell vs. Dakota Central Telephone Co., 246 U. S. 396 (at 412) 62 L. Ed. 793.
Knoxville Gas Co. vs. City 261 Fed. 283.
Knoxville Water Company vs. Knoxville, 200 U. S. 22.
Blair vs. Chicago, 200 U. S. 34.
Home Telephone Company vs. Los Angeles 211 U. S. 265, 273, 274.
Pioneer Telephone & Telegraph Co. vs. State, 127 Pac. 1073 on p. 1076.
City of Minneapolis vs. Minneapolis Street Ry. Co., 215 U. S. 417-54 L. Ed. 259.
Detroit vs. Citizens Street Railway Company, 184 U .S. 368 46 L. Ed. 592.
City of Cleveland vs. Cleveland St. Ry. Co., 194 U. S. 517, 48 L. Ed. 1102.
Rogers Park Water Co. vs. Fergus 178 Ill., 578 53 N. E. 363.
Rogers Park Water Company vs. Fergus, 180 U. S. 624, 45 L. Ed. 702.
Omaha Water Company vs. City, 147 Fed. 1.
Brummitt vs. Odgen Water Works Co., 33 Utah 303-93 Pac. 828.
Rosecrans vs. U .S., 165 U. S. 263.
U. S. vs. Jackson, 143 Fed. 787 on 188.

(b) No power to fix or contract for rates can be implied.

Louisville Natural Gas Co. vs. State, 134 Ind. 49, 34 N. E. 702.

Becker vs. Keokuk Water Works, 79 Ia. 419-422.
Cedar Rapids Water Co. vs. Cedar Rapids, 118 Ia. 234 on p. 255.
Mills vs. Chicago, 127 Fed. 731.
Town of Williams vs. Iowa Falls Electric Co., 170 N. W. 815 on p. 816.

(c) All doubtful expressions of the grant are to be resolved against the power to contract.

Ottumwa Ry. & Light Co. vs. Ottumwa, decided August 9, (Iowa), 178 N.W. p. 905.
Knoxville Gas. Co. vs. City, 261 Fed. 283.

(d) "The surrender by contract, of a power of government, though in certain well defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature has the authority to make such a surrender, unless the authority is clearly delegated to the municipality by the supreme legislature. The general powers of a municipality or of any other political sub-division of the state are not sufficient. Specific authority for that purpose is required."

Home Telephone & Telegraph Co. vs. City of Los Angeles, 211 U. S. 265, 53 L. Ed. 176. Decided Nov. 30, 1908.

Town of Williams vs. Iowa Falls Electric Co., 170 N. W. 815, 816.

Rogers Park Water Co. vs. Fergus, 178 Ill. 578, 53 N. E. 363.

Rogers Park Water Co. vs. Fergus, 180 U. S. 624, 630, 45 L. Ed. 702, 706.

Milwaukee Elec. Ry. Co. vs. Railroad Commission, 238 U. S. 174, 59 L. Ed. 1254, 1260, first column.

Freeport Water Co. vs. Freeport, 180 U. S. 587, 599, 611, 45 L. Ed. 679, 688, 693.

Marquis vs. Polk County Telephone Co., 100 Neb. 140, 158 N. W. 927.

Brummit vs. Ogden Water Works Co., 33 Utah 302, 93 Pac. 828, 834.

City of Zanesville vs. Zanesville Light Co. 47 O .St. 1, 23 N. E. 55, 59.

Portland Ry. L. & P. Co. vs. Portland, 201 Fed. 119, 125, 126.

Puget Sound Traction L. &. P. Co. vs. Reynolds, 223 Fed. 371, 375.

DIVISION TWO

SECTION 725 OF THE CODE CONFERS EXPRESS POWERS ON MUNICIPALITIES OVER GAS RATES AND THEREBY ELIMINATES THE SUBJECT FROM THE IMPLIED POWERS OF GENERAL STATUTES.

Rosecrans vs. U. S., 165 U. S. 257 on p. 262.

United States vs. Jackson, 143 Fed. on p. 787-788.

City of Keokuk vs. Scroggs, 39 Ia. 447.
McBride vs. Railway Company, 134 Iowa 405.
Jackson vs. C. R. I. & P. Ry. Co., 178 Fed. 432 on p. 434.
Jackson vs. Cravens, 238 Fed. on p. 119.
Walla Walla vs. Walla Walla Water Co., 173 U. S. p. 1-43 L. Ed. 34.

DIVISION THREE

THE ONLY IOWA STATUTES RELATING TO THE CONFERRING OF POWER UPON MUNICIPALITIES TO GRANT GAS FRANCHISES TO PRIVATE PERSONS OR CORPORATIOS AND THE REGULATING OF RATES FOR GAS SERVICE FURNISHED BY AUTHORITY OF SUCH FRANCHISES, ARE SECTIONS 720 AND 721 OF THE 1913 SUPPLEMENT TO THE CODE, WHICH AUTHORIZE THE GRANTING OF SUCH FRANCHISES AND REQUIRE THAT THEY BE APPROVED BY A MAJORITY VOTE OF THE LEGAL VOTERS AND SECTION 725 WHICH CONFERS POWER UPON CITY COUNCILS TO REGULATE AND FIX GAS RATES, BUT DOES NOT REQUIRE THAT SUCH REGULATION OR FIXING BE SUBMITTED TO THE LEGAL VOTERS FOR APPROVAL. THE LEGISLATIVE HISTORY OF THESE SECTIONS DISCLOSES INTENT TO WITHDRAW AND DENY ANY POWER TO CONTRACT.

So held in Town of Woodward vs. Ia. Ry. & L. Co., 178 N.W. 549 on p. 550.

Sections 720 and 725 originated in Section 471 of the Code of 1873 of the laws of Iowa, which em-

powered municipal corporations to grant franchises to individuals or corporations to erect water works, said section being as follows:

> "Sec. 471. They shall have the power to erect water works, or to authorize the erection of the same; but no such works shall be erected or authorized until a majority of the voters of the city or town at a general or special election, or four-fifths of the members of the council or board of trustees thereof, by vote, approve the same."

and Section 473, which authorizes the city or town to contract with the franchise holder as to the rates for water service rendered the town for municipal purposes, and also as to the rates to be charged to private consumers, said statute being as follows, to-wit:

> "Sec. 474. When the right to build and operate such works is granted to private individuals or incorporated companies by said cities and towns, they may make such grant to inure for a term of not more than twenty-five years and to authorize such individual or company to charge and collect from each person supplied by them with water, such water rent as may be agreed upon between said person or corporation so building said works, and empowered to enter into a contract with the individual or company constructing said works, to supply said city or

town with water for fire purposes and for such other purposes as may be necessary for the health and safety thereof, and to pay therefor such sum or sums as may be agreed upon between said contracting parties."

Chapter XI of the Acts of the 22nd General Assembly, effective April 12, 1888, made the provisions of Section 471 apply to gas and electric light plants, said act so far as is necessary for the decision of this case being as follows:

"Section 1. That Section 471 and 473 of the Code of 1873, be and the same is hereby amended by inserting in the first line thereof after the word "works" the following words, "or to establish and maintain gas works or electric light plants, with all necessary poles, wires, burners and other requisits of said gas works or electric light plants."

"Section 2. That Section 473 of the Code of 1873 shall be held to apply to the establishment and maintenance of gas works and electric light plants as fully as they do to the erection of water works."

Afterwards the same legislature passed Chapter 16, effective July 4th, 1888, three months and twenty-two days after Chapter 11 took effect, which conferred power upon cities of the first and second class, having over seven thousand inhabitants, and

special charter cities to regulate gas rates, but declaring that the statute should not be construed as to authorize the abridgment of the power to regulate upon the making of any contract, and conferred said power and provided the limitation in the following language:

> "That all cities of the first class and cities of the second class having 7000 inhabitants, and cities organized under special charters in this state, in addition to the powers now granted shall have the further and additional powers conferred by this act as follows, 'to regulate the price of gas, electric light, water rates and to regulate and fix the charges for water meters, gas meters, electric light meters,' etc, This shall not be construed to authorize the passage of an ordinance or resolution on the making of any contract whereby the above powers are abridged."

There was no further amendment to this statute until the enactment of the Code of 1897, and until that time municipal corporations having less than seven thousand inhabitants continued to possess the power of contract as to gas rates for both public and private consumption.

The Code of 1897 conferred like and equal powers upon all municipal corporations, irrespective of whether they were cities or towns, or the number of inhabitants, and separated the private powers

conferred by Section 471 and 473 of the Code of 1873 as amended by the 22nd General Assembly from the general powers conferred upon municipal corporations by the same sections.

The private powers were incorporated in and appear as Section 720 of the Code of 1897, which is as follows:

> "Sec. 720. WATER OR GAS WORKS—ELECTRIC PLANTS. They shall have the power to purchase, establish, erect, maintain and operate, within or without the corporate limits of any city or town, water works, gas works, or electric light or power plants, with all the necessary reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus and other requisites of said works or plants for a term of not more than twenty-five years, and may renew or extend the term of such grant; but no exclusive franchise shall be thus granted, extended or renewed. No such works or plants shall be authorized, established, erected, purchased, leased or sold, or franchise extended or renewed, unless a majority of the legal electors voting thereon vote in favor of the same at a general or special election."

This act was afterwards amended by Chapter 44 of the 33rd G. A. permitting the approval of the franchise to be submitted at a city election.

Section 720 was further amended by Chapter 34 of the Acts of the 34th General Assembly so as to authorize its amendment or renewal and so as to require such amendment to be approved by the legal voters.

Section 720 was further amended by Chapter 66 of the 35th G. A., which is as follows:

"Chapter 66"

"Authority of cities and towns to contract to purchase heat, gas, water and electric current and to sell same."

"An Act to amend the law as it appears in Section seven hundred twenty (720) supplement to the Code, 1907, as amended by chapter forty-four (44) acts of the thirty-third (33) general assembly, and chapter thirty-four (34) acts of the thirty-fourth general assembly and to authorize cities and towns to enter into contracts to purchase heat, gas and electric current, and to sell the same.

Be it enacted by the General Assembly of the State of Iowa:

Section 1. HEAT, GAS, WATER, ELECTRIC CURRENT—BUY AND SELL. That the law as it appears in section seven hundred twenty (720) of the supplement to the code, 1907, as amended by chapter forty-four act of the thirty-third (33) general assembly, and chapter

thirty-four (34) acts of the thirty-fourth (34) general assembly, be and the same is hereby amended by adding thereto after the period following the word "renewed" in the tenth line thereof, the following: "And they shall have the power to enter into contracts with persons, corporations, municipalities for the purchase of heat, gas, water and electric current for either light or power purposes, and shall have power to sell the same either to residents of such municipality, or to others, including corporations, and to erect and maintain the necessary transmission lines therefor, whether within or without the corporate limits, to the same extent in the same manner, and under the same regulations, with the same power to establish rates and collect rents as is or hereafter may be provided by law for cities having municipally owned plants," and by inserting after the word "amended" in the twelfth line of said sections as amended by chapter thirty-four (34) acts of the thirty-fourth (34) general assembly the following; "or contract of purchase entered into."

Said Section 720, as hereinbefore set out, and as it now appears as Section 720 of the 1913 Supplement to the Code of Iowa is as follows:

"Heating plants—water or gas works—electric plants—purchase and sale of heat, gas, water and

electric current: They shall have power to purchase, establish, erect, maintain and operate, within or without the corporate limits of any city or town heating plants, waterworks, gas works or electric light or electric power plants, with all the necessary reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus and other requisites of said works or plants, and lease or sell the same. They may also grant to individuals or private corporations the authority to erect and maintain such works or plants for a term of not more than twenty-five years, and may renew, amend or extend the term of such grant; but no exclusive franchise shall be thus granted, amended, extended or renewed. And they shall have power to enter into contracts with persons, corporations or municipalities for the purchase of heat, gas, water, and electric current for either light or power purposes, and shall have power to sell the same either to residents of such municipality or to others, including corporations, and to erect and maintain the necessary transmission lines therefor either within or without the corporate limits, to the same extent, in the same manner, and under the same regulation, with the same power to establish rates and collect rents as is or hereafter may be provided by law for cities having municipally owned plants. No such works or plants shall be authorized, established, erected, purchased, leased or sold, or franchise ex-

tended or renewed or amended, or contract of purchase entered into, unless a majority of the legal electors voting thereon vote in favor of the same at a general, city or special election.

SECTION 725. CODE OF IOWA is as follows:

Regulation of Rates and Service. They shall have the power to require every individual or private corporation operating such works or plant, subject to reasonable rules and regulation, to furnish any person applying therefore, along the line of its tubes, pipes, mains, wires, or other conduits, with gas, water, light or power and to supply said city or town with water for fire protection, with gas, water, light and power for necessary public purposes and to make and fix the rent or rate for water, gas, electric light or power; to regulate and fix the rents or rates or water, gas, electric light or power * * * and these powers shall not be abridged by ordinances, resolutions or contracts.

DIVISION FOUR

THE FACT THAT SECTION 720 OF THE SUPPLEMENT TO THE CODE HAS SPECIFIED BUT ONE CONDITION OF THE GRANT, A LIMIT OF TWENTY-FIVE YEARS, NEGATIVES THE IDEA THAT ANY OTHER CONDITION MAY BE ATTACHED TO THE GRANT.

State ex. rel. N. Y. & N. S. Traction Company vs. Public Service Commission of N. Y., 162

N. Y. Supp. 405; P. U. R., 1917, B. P. 957 Decision by N. Y. Sup. Court, Appelate Division, Third Department.

DIVISION FIVE

THE LONG SETTLED CONSTRUCTION OF THE IOWA STATUTES BY ITS HIGHEST JUDICATURE, (THE IOWA SUPREME COURT)' IS THAT, THEY DO NOT CONFER ANY POWER OR AUTHORITY UPON MUNICIPALITIES TO ENTER INTO LAWFUL AND BINDING CONTRACTS WITH PUBLIC UTILITY COMPANIES FIXING GAS, WATER, HEATING OR ELECTRIC RATES, TO BE CHARGED TO PRIVATE CONSUMERS, BUT TO THE CONTRARY PROHIBIT THE MAKING OF SUCH CONTRACTS BY THE MUNICIPALITIES.

Town of Woodward vs. Iowa Railway and Light Co., 178 N. W. 549.

Ottumwa Railway and Light Co. vs. City of Ottumwa, 178 N. W. 905.

Selkirk vs. Gas Company, 176 N. W. 301.

Iowa Railway and Light Company vs. Jones, 164 N. W. 780.

Town of Williams vs. Iowa Falls Electric Company, 170 N. W. 815.

DIVISION SIX

THE PREVIOUS HOLDINGS OF THE IOWA SUPREME COURT, CONSTRUING THE IOWA STATUTES RELATING TO THE GRANTING OF FRANCHISES AND THE REGULATION OF RATES ARE CONTROLLING UPON THE FEDERAL COURTS IN

CONSTRUING SUCH STATUTES, THE FEDERAL COURTS NOT HAVING CONSTRUED SUCH STATUTES

Raymond vs. Parish of Terrebonne, 28 Fed. 773.

(a) State Courts certainly have a right to expound the statutes of the state; and, having done so, those statutes with the interpretation given to them by the highest court of the state become the rule of decision in the Federal Courts.

Raymond vs. Parish of Terrebonne, 28 Fed. 773.
Richmond vs. Smith, 15 Wall, 429.
Jones vs. Richmond, 18 Gratt (Va.) 517.
Leffingwell vs. Warren, 2 Black 599.
Milwaukee Elec. Ry. & Lgt. Co. vs. Railroad Commission, 238 U. S. 174, 59 L. Ed. 1254 on p. 1261.

(b) The construction placed by the supreme court of a state on an act of its state legislature was controlling in United States supreme court although the result was that the latter court was thereby compelled to hold the enactment unconstitutional and void.

Hall vs. DeCuir, 95 U. S. 485, 24 L. Ed. 547.

DIVISION SEVEN

THE SETTLED CONSTRUCTION OF THE IOWA STATUTES RELATING TO GAS, HEATING, ELECTRIC, AND WATER FRANCHISES AND RATES IS SUSTAINED BY THE DECISIONS OF THE FEDERAL COURTS.

Knoxville Gas Co. vs. Knoxville, (C. C. A.) 261 Fed. 283.

Home Telephone Co. vs. Los Angeles, 211 U. S. 265.

San Antonio Company vs. City, 257 Fed. 467.

Rogers Park Co. vs. Fergus, 189 U. S. 264, 21 Sup. R. 480.

DIVISION EIGHT

THE POWERS CONFERRED BY SECTION 725 OF THE SUPPLEMENT OF THE CODE UPON MUNICIPALITIES IN RESPECT TO RATES IS GOVERNMENTAL IN CHARACTER TO BE EXERCISED BY LEGISLATION AND IS CONTINUOUS SO THAT A CITY COUNCIL MAY NOT BIND ITSELF OR ITS SUCCESSOR COUNCILS TO ANY DEFINITE RATE FOR ANY DEFINITE LENGTH OF TIME.

(a) Section 725 confers police or governmental powers to be exercised by legislation. Distinction between governmental powers of a municipality by which it governs its people and its business powers exercised for the private advantages of the municipality as a legal personality.

Illinois Trust and Savings Bank vs. City of Arkansas City, 76 Fed. 271.

(b) Section 725 Supplement of the Code confers public or governmental powers to be exercised by legislation for the regulation of transactions between public service companies and their patrons, to which the municipality is not a party.

City of Tipton vs. Tipton L. & H. Co., 176 Ia. at p. 230 et seq.

Dillon 5th Ed. Vol. 5, Sections 325.

Gas Company vs. City of Cedar Rapids, 144 Ia. 426.

Rogers Park Water Company vs. Fergus, 180 U. S. 624, 45 L. Ed. 702.

Pioneer Telegraph & Telephone Company vs. City of Oklahoma, 127 Pac. 1073.

Home Tel. Co. vs. Los Angeles, 211 U. S. 265, 53 L. Ed. 176, p. 183.

Town of Williams vs. Iowa Falls Electric Company, 170 N. W. 815.

Selkirk vs. Gas Co., 176 N. W. 301.

San Antonio Company vs. City, 257 Fed. 467.

Iowa Railway & Light Co. vs. Jones, 164 N. W. 780 (Iowa).

Knoxville vs. Knoxville Gas Co., 261 Fed. 283.

Freeport Water Co. vs. Freeport, 180 U. S. 587, 45 L. Ed. 679.

(c) Where a statute is susceptible of two constructions the one favoring the continuation or retention of the power in the state will be sustained as being the most favorable to the public.

DIVISION NINE

NEITHER THE DEFENDANT CITY OR THE PLAINTIFF COMPANY WAS BOUND BY THE RATES FOR THE THREE YEAR TERM REFERRED TO IN SECTION 3 OF THE FRANCHISE ORDINANCE.

(a) The power to regulate rates conferred on cities by Section 725 of the Code is a continuing one, and one city council may not tie up its successors by anything it may do, and the rates specified are subject to subsequent adjustment as may be deemed expedient by the city council.

Iowa Railway & Light Co., vs. Jones, 164 N. W. 780 at p. 782.

(b) The approval by electors of rates, in a franchise is merely an approval of rates temporarily settled with the understanding that the same may be changed upwards or downwards. Ottumwa Railway and Light Co. vs. City of Ottumwa, 178 N. W. 905 at p. 906.

(c) As to corporations named in Section 725, there can be no contracting that rates fixed for service shall not be changed.

Ottumwa Railway & Light Co. vs. City of Ottumwa, 178 N. W. 905 at p. 906.

(d) The fixing of maximum rates in a franchise ordinance is not a contract that such rates may not be changed before the time stated in such ordinance has lapsed.

Ottumwa Railway & Light Co. vs. City of Ottumwa, 178 N. W. 905 at p. 906.

DIVISION TEN

DEFENDANT'S ALLEGATION IN ITS AMENDED AND SUBSTITUTED ANSWER (RECORD PAGE 42) THAT "ACCEPTANCE OF THE FRANCHISE MADE A VALID AND BINDING CONTRACT FOR RATES THEREIN FIXED UNTIL THE EXPIRATION OF THE THREE YEAR PERIOD, UNLESS SOONER CHANGED BY THE CITY COUNCIL UNDER AND BY VIRTUE OF ITS POWER TO FIX AND REGULATE RATES AS PROVIDED BY STATUTE" SHOWS THE ALLEGED "CONTRACT" VOID FOR WANT OF MUTUALITY.

Iowa Railway & Light Co. vs. Jones, 164 N. W. 780 (Iowa).

Usher vs. Livermore, Vol II Cole's Iowa Reports, 117.

13 Corpus Juris 331, 332.

Town of Williams vs. Iowa Falls Elec. Co., 170 N. W. 815 (Iowa).

Dorsey vs. Packwood, 12 Howard 126, 13 (U. S.) L. Ed. 921.

Rutland Marble Co. vs. Ripley, 10 Wall 339, 19 L. Ed. 955.

Nichol vs. Wetmore, 156 N.W. 319 (Iowa).

Great Northern Ry. Co. vs. Cheyenne Telephone Co., 145 N. W. 1062.

Velie Motor Car Co. vs. Kopmeier, 194 Fed. 324

Oakland Motor Car Co. vs. Ind. Auto Co., 201 Fed. 499.

Tweedie Trading Co. vs. Parlin & Orendorff Co., 204 Fed. 50.

Ellis vs. Dodge Bros., 237 Fed. 860.

DIVISION ELEVEN

THE VOID RATE CLAUSE IN A FRANCHISE DOES NOT BIND GRANTEE ON ACCOUNT OF GRANTEE'S ACCEPTANCE OF THE FRANCHISE AS A WHOLE.

State of Iowa vs. Chariton Telephone Co., 173 Ia. 497.

Chamberlain vs. Iowa Telephone Company, 119 Iowa 699.

Doyle vs. Wilcockson, 178 N. W. at 244.

Cedar Rapids Water Co. vs. Cedar Rapids, 118 Ia., 241-255.

Cargill vs. Minnesota, 655 C. at 468, 45 L. Ed. 626.

ARGUMENT

The power of municipalities to contract must be conferred in express terms by act of the legislature, or indispensable to the exercise of a power expressly conferred by act of the legislature.

The Supreme Court of Iowa in Heins vs. Lincoln, 102 Iowa 69, at page 77 said:

> "Municipal corporations possess and can exercise only the following powers—(1st) those granted in express words; (2nd) those necessarily or fairly implied or incident to the powers expressly granted; and (3rd) those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Such are the rules laid down by Judge Dillon in his excellent work on municipal corporations, and they are undoubtedly correct. Dillon on Municipal Corporations, Sec. 89." (Also citing numerous Iowa cases.)

In Town of Akron vs. McElligott, 147 N. W. 773 (Iowa) at page 774, the court said:

> "It is well settled that the power of a municipal corporation is only such as is conferred upon it by statute, and that it has no other powers than are so conferred upon it by express legislative grant, or such as arises by necessary implication as incidental to the powers

expressly granted, or such as are indispensable to the purposes for which the municipality was created." Burroughs vs. Cherokee, 134 Iowa 429; 109 N. W. 876; Cherokee vs. Perkins, 118 Iowa 405, 92 N. W. 68; Logan vs. Paine, 43 Ia. 524; Burlington vs. Baumbardner 42 Iowa 673; Keokuk vs. Scroggs, 39 Iowa 447."

In Ottumwa Railway & Light Company vs. City of Ottumwa, 178 N. W. 905 (Iowa) (decided August 9, 1920), on page 906, the court said:

"The vital requirement is that the power to make a contract fixing permanent rates be given expressly and by 'unmistakable grant' (citing cases). The grant must be in explicit and convincing terms and all doubtful expressions are to be resolved against the power to contract for irrevocable rates. (citing cases)."

The rule is announced by the United States Supreme Court in Mitchell vs. Dakota Central Telephone Co., 246 U. S. 396, 38 Sup. C. 362, 62 L. Ed. 793, dated May 15, 1918, in the following statement:

"The grant of rights and privileges by the state to any of its municipalities are strictly construed and whatever is not unequivocally granted is withheld. Nothing passes by mere implication. Knoxville Water Co. vs. Knoxville 200 U. S. 22; Blair vs. Chicago, 200 U. S. 34."

The latest expression of the Federal courts is that of the Circuit Court of Appeals of the Sixth District, in Knoxville Gas Co. vs. City of Knoxville, 261 Fed. 283, (decided November 5, 1919) on page 287, the court said:

> "The power to establish prices to be charged by public service corporations, whether it is to be exercised by regulation or by contract, resides primarily in the state—here the state of Tennessee—admittedly it is capable of being delegated by the legislative branch of the state to its muncipailities. * * * It is enough for present purposes to say that the character of the power is governmental and the consequent importance of *conserving* it is manifest; indeed in the absence of specific provision to the contrary, it is to be interpreted as a power continuing in nature and incapable of being bartered away. Can it be safely said, then, that the state of Tennessee has both surrendered part of its own power and in effect authorized the city of Knoxville to exercise it by contract? The settled Federal rule in respect of both of these features is exacting and need not be misunderstood; it requires that the intent of the state so to give up a portion of its power must be in explicit and convincing terms—in plain words—and that doubtful expressions should be resolved in favor of the state.

"Mr. Justice Moody said in Home Telephone Co. vs. Los Angeles, 211 U. S. 265, 273, 29 Sup. Ct. 50, 52 (53 L. Ed. 176).

> 'It has been settled by this court that the state may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation (or natural person) for a definite term, but not grossly unreasonable in point of time, and that the effect of such a contract is to suspend during the life of the contract, the governmental power of fixing and regulating the rates. * * * But for the very reason that such a contract has the effect of extinguishing pro tanto an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubt must be resolved in favor of the continuance of the power.' "

"Later in applying the rule as thus expressed to the power to fix street railway rates in Milwaukee Elec. Ry. vs. Wisconsin R. R. Comm., 238 U. S. 174, 180, 35 Sup. Ct. 820, 882 (59 L. Ed. 1254) Mr. Justice Day said:

> "* * * It has been uniformly held in this court that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction.' "

In Home Telephone & Telegraph Co. vs. Los Angeles, 211 U. S. 274, 53 L. Ed. 176, at page 182, the court:

"The surrender, by contract, of a power of government, though in certain well-defined cases, it may be made by legislative authority is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature (in this case the legislature of the state) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for that purpose is required. This proposition is sustained by all the decisions of this court, which will be referred to hereafter, and we need not delay further on this point."

No power to fix or contract for rates can be implied.

The holding in Becker vs. Keokuk Water Works, 79 Iowa 419, is well stated in the second paragraph of the syllabus, which is as follows:

"The powers conferred upon municipal corporations are to be strictly construed (Clark vs.

City of Des Moines, 19 Iowa, 212; McPherson vs. Foster, 43 Iowa, 57); and the law, which authorizes cities to contract for the building and operation of waterworks by individuals or companies, confers no power to contract with such individual or company to indemnify a citizen and taxpayer for damages which he may sustain by reason of a failure to furnish water as provided in the contract, so as to enable the citizen to maintain an action therefor in his own name."

In Town of Williams vs. Iowa Falls Electric Company, 170 N. W. 815 (Iowa) at page 816, the court said:

"The legislature can give power to a town to contract that rates fixed shall not be changed for a stated period, but authority to 'regulate and fix' rates does not authorize such a contract. Power to make one can be given by unmistakable grants alone—and, without such grant, no contract that rates shall be unalterable is valid. That has support in Rosecrans vs. United States, 165 U. S. 263, 17 Sup. Ct. 302, 41 L. Ed. 708, and in U. S. vs. Jackson, 143 Fed. at pages 787, 788, 75 C. C. A. 41. This is so because enforcing such a one would, in whole or in part, extinguish an undoubted governmental power. So holds Home Telephone Co. vs. City, 211 U. S. 265, 29 S. Ct. 50, 53 L. Ed. 176."

In Mills vs. City of Chicago, 127 Fed. 731, the Circuit Court said on page 733:

> "Has the city the power by ordinance to regulate the rates of gas supply? A municipal corporation possesses only such power as is granted by the legislature in express words, or such as is fairly implied from power expressly granted, or is essential to the specific object and purposes of municipal existence. No one has pretended that the regulation of the price of gas is essential to the specific object for which the City of Chicago was created; hence that source of possible power may be dismissed without further discussion."

All doubtful expressions of the legislative grant are to be resolved against the power to contract.

In Ottumwa Railway & Lt. Co. vs. City of Ottumwa, 178 N. W. 905 (Iowa) on page 906, the court said:

> "It is not material that no statute invalidates such contract. The vital requirement is that power to make a contract fixing permanent rates be given expressly and by 'unmistakable grant,' Rosecrans vs. U. S. 165, U. S. 263, 17 Sup. Ct. 302, 41 L. Ed. 708; U. S. vs. Jackson, 143 Fed. 787, 788, 75 C. C. A. 41. The grant must be in explicit and convincing terms and all

doubtful expressions are to be resolved against power to contract for irrevocable rates. Knoxville Gas Co. vs. City (C. C. A.) 261 Fed. 283. The Supreme Court ruled in Home Telephone Co. vs. Los Angeles, 211 U. S. 274, 277, 278, 29 Sup. Ct. 54, 53 L. Ed. 176, and on review of authorities:

'All these cases agree that the legislative authority to the municipality to make the contract must clearly and unmistakably appear.' ''

In Knoxville Gas. Co. vs. City of Knoxville, 261 Fed. 283, on page 287, the court said:

"Can it be safely said that the state of Tennessee has both surrendered part of its own power and in effect authorized the city of Knoxville to exercise it by contract? The settled Federal rule in respect to both these features is exacting and need not be misunderstood. It requires that the intent of the state so to give up a portion of its power must appear in explicit and convincing terms—in plain words—and that doubtful expressions shall be resolved in favor of the state."

on page 291, the court further holds after citing Cleveland vs. Cleveland Street Railway Co., 194 U. S. 517, and Home Telephone & Telegraph Co. vs. Los Angeles, 211 U. S. 274, and other cases cited:

"The dominating principal of these decisions is that municipalities will not be regarded as possessed of the right to bind themselves to a specified public service rate and term, except only under statutes granting to them express power to contract or agree as to such rates and time, and the uniform reliance placed upon this principal in the decisions of the Supreme Court is controlling, unless a settled course of decision in the court of last resort of Tennessee requires a different conclusion. It is urged that the rule thus established as to the necessity of explicit statutory language does not prevail in the courts of Tennessee. We cannot think this accords with the decision in Knoxville Water Co. vs. Knoxville, 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888."

"The surrender by contract of a power of government, though in certain well defined cases it may be made by legislative authority is a very grave act, and the surrender itself, as well as authority to make it must be closely scrutinized. No other body than the supreme legislature has authority to make such surrender, unless the authority is clearly delegated to the municipality by the supreme legislature. The general powers of a municipality are not sufficient. Specific authority for that purpose is required.

The above is a verbatim quotation from Home Telephone & Telegraph Co. vs. City of Los Angeles, 211 U. S. 265, 53 L. Ed. 176, on page 182.

In Milwaukee Electric Railway Co. vs. R. R. Comm. of Wisconsin, 238 U. S. 174, 59 L. Ed. 1254, at page 1260, the court says:

> "The fixing of rates which may be charged by public service corporations of the character here involved, is a legislative function of the state, and while the right to make contracts which shall prevent the state during a given period from exercising this important power has been recognized and approved by judicial decisions, it has been uniformly held in this court that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction. This proposition has been so frequently declared by decisions of this court as to render unnecessary any reference to the many cases cases in which the doctrine has been affirmed. The principal involved was well stated by Mr. Justice Moody in Home Teleph. & Teleg. Co. vs. Los Angeles, 211 U. S. 265, 273, 53 L. Ed. 176, 128, 29 Sup. Ct. 50."

In Portland Ry. & Lt. Co. vs. Portland, 201 Fed. 119, at page 125, the court held:

"It is enough that the authorities are agreed that the right to reasonably regulate rates to be charged by public service corporations is a governmental power, continuing in its nature, and while it may be suspended in a given case by a contract for a definite time, not grossly unreasonable in point of time, (Detroit vs. St. Ry., 184 U. S. 368, 22 Sup. Ct. 419, 46 L. Ed. 592: Vicksburg vs. Water Co., 206 U. S. 496, 27 Sup. Ct. 762, 51 L. Ed. 1155; Los Angeles vs. Water Co., 177 U. S. 558, 20 Sup. Ct. 736, 44 L. Ed. 886; Minneapolis vs. St. Ry.,215 U. S. 417, 30 Sup. Ct. 118, 54 L. Ed. 259; Cleveland vs. St. Ry., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102; Walla Walla vs. Water Co., 172 U. S. 1, 19 Supt. Ct. 77, 43 L. Ed. 341, it can only be done by words of positive grant or language equivalent thereto, and then only by the supreme legislative body of the state, unless the authority to do so is clearly delegated by it to such governmental subdivision.

'The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for the purpose is required. This proposition' says the court in Telephone Co. vs. Los Angeles, supra, 'is sustained by all the decisions of this court.' "

It is further said in that case:

"For the very reason that such a contract has the effect of extinguishing pro tanta an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power' (citing a large number of cases.)

"It was consequently held that authority to a municipality to grant a franchise to the highest bidder after public advertisement, stating the character, terms and conditions of the franchise, 'to erect or lay telephone wires * * upon any public street or highway' and 'to regulate telephone service and the use of telephones, * * * and to fix and determine the charges for telephones and telephone service and connections conferred ample authority to exercise the governmental power of regulation charges, but not 'authority to enter into a contract to abandon the governmental power itself,' notwithstanding the franchise so sold by the city provided that the charge for services should not exceed specified amounts. All the leading decisions bearing on this subject are so thoroughly and carefully reviewed and the distinctions between them pointed out by Mr. Justice Moody in the case just referred to that it is unnecessary to prolong this opinion by reference to them."

In Puget Sound T. L. & P. Co. vs. Reynolds, 223 Fed. 371, on page 375, the court said:

> "That said ordinance may constitute a contract within the meaning of the constitution is well settled—but it is equally well settled that a municipal corporation can not barter away a police power of the state by unalterably fixing rates and fares during the life of a franchise, unless specifically and expressly authorized so to do by the supreme legislative authority of the state."

Section 725 of the Code confers express powers on municipalities over gas rates, and thereby eliminates the subject from the implied general powers of general statutes.

Special statute supersedes implied powers of general statutes.

There is another objection to the claim that general powers of Section 720 would include the right to fix rates. The legislature by special statute (section 725) conferred specific power in respect to rates upon municipal corporations to be exercised in a certain way. It is elementary that a special statute conferring power upon a city council to do a thing eliminates the subject thereof from implied general powers of general statutes.

The question involved in Rosecrans vs. U. S., 165 U. S. 263, 41 L. Ed. 708, was one of jurisdiction

of the Circuit Court of the United States, and involving the construction of several statutes. It was claimed that by implication from certain general statutes, jurisdiction was given repugnant to the provisions of a special statute. At page 263, the court said:

> "When there are statutes clearly defining the jurisdiction of the courts, the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation. In other words, where Congress has expressly legislated in respect to a given matter, that express legislation must control, in the absence of subsequent legislation equally express, and is not overthrown by any mere inferences or implications to be found in such subsequent legislation."

To the same effect is United States vs. Jackson, 143 Fed. 787, 788.

Special enactment eliminates all implied powers from other enactments of general nature on the same subject.

The case of City of Keokuk vs. Scroggs, 39 Iowa 447 involves powers of municipal corporation and holds that the general power conferred by the charter of the city was limited by the specific provisions

of amendment to the charter, which controlled as against general provisions of the original charter with respect to fire ordinances.

McBride vs. Railway Co., 134 Iowa 405, was a personal injury case involving certain rights arising under different ordinances of Des Moines relative to the use of the streets by the railway company and fire company. On page 405, it is held that the provisions of the special statute in regard to the use of streets by the fire company prevailed against conflicting provisions of general ordinances. The court says:

> "However this may be, the specific provisions of the ordinances as to the engines and carriages of the fire department constitute exceptions to the general provisions relating to teams and vehicles. That the provisions of a statute or ordinance as to a specific subject matter will prevail over general provisions, which, but for the specific provision on the same subject, would have covered the subject matter of the latter, is a proposition too elementary to require discussion."

The case of Jackson vs. C. R. I. & P. Ry. Co., 178 Fed. 434 involved a conflict between a general statute and a special or specific one, and it was held that the statutes specifically covered the subject matter and prevailed against the general statute.

Jackson vs. Cravens, 238 Fed. 120, involved the construction of conflicting statutes, and it was held

that a specific statute covering the subject matter prevails against the provisions of a general statute.

Walla Walla vs. Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341, was a suit to enjoin the city from erecting water works. The court held that a city charter authorizing a contract for a water supply without providing for an election to ratify it although it does provide for such an election as a condition of the erection of water works by the city, supersedes a general statute that requires such election to ratify a contract for a water supply.

The only Iowa statutes relating to the conferring of powers upon municipalities to grant gas franchises to private persons or corporations and the regulation of rates for gas service are Sections 720 and 721 of the 1913 Supplement to the Code, which authorizes the granting of such franchises, and requires that they be approved by a majority vote of the legal voters, and Section 725 of the Supplement to the Code, which confers powers upon city councils to regulate and fix gas rates and does not require that such regulation or fixing be submitted to the legal voters for approval. The legislative history of these sections discloses intent to withdraw and deny any power to contract.

We do not feel that it will be contended that there is an express legislative enactment conferring upon the defendant city authority to fix rates by contract for private consumers, but defendant's

counsel intimated that in their opinion Section 720 conferred such power. The legislative history of Section 720 conclusively shows that its purpose was to confer powers upon municipalities to enable them to perform a private or business function of providing a supply of gas, water, heat and electricity for its own use, leaving the question of rates for private customers to be provided for in Section 725.

Section 720 originated in Sections 471-474 of the Code of 1873. Section 471 empowered municipal corporations to erect municipal water works. Section 473 authorized municipal corporations to grant franchises to individuals or corporations to erect water works and expressly authorized municipal corporations to contract as to rates for services rendered to the town, and also to the private consumers of the water works.

Chapter 11 of the Acts of the 22nd General Assembly made the provisions of Section 471, 472, 474 and 475 apply to gas works and electric light plants, "as fully as they do to the erection of water work." This act became effective in 1888, and thereafter and up to July 4, 1888 all municipal corporations possessed the power to contract as to rates for service to both public and private consumers.

The same legislature passed Chapter 16 of the Acts of the 22nd G. A., which became effective July 4, 1888, which conferred powers on cities of the first and second class having more than 7000 inhabitants, and special charter cities to "regulate the price of gas, electric light, water rates, and to regu-

late and fix the charges for water meters, etc." but the section also provided that the power conferred to "regulate" should not be construed to authorize the passage of an ordinance on the making of any contract whereby the above powers are abridged.

The effect of Chapter 16 of the 22nd G. A. was to take away from cities of the first and second class having over 7000 inhabitants, and cities under special charter, the right they had theretofore possessed of contracting for rates for public and private consumption, and to substitute therefor a right to "regulate," which could not be exercised by contract, and prohibited the regulation being done by contract. In other words, declaring that the regulation must be by legislative act.

Municipal corporations having less than 7000 inhabitants continued to possess the power of contracting as to rates for both public and private consumption. There was no further amendment of the statutes until the enactment of the Code of 1897.

The Code of 1897 conferred like and equal powers upon all municipal corporations irrespective of whether they were cities or towns or the number of inhabitants, and separated the private powers conferred by Sections 471-473 of the Code of 1873 as amended by the 22nd General Assembly from the public powers conferred upon municipal corporations by the same section.

The private powers were incorporated in and appear as Section 720 of the Code of 1897. This section simply provides the means by which a muni-

cipal corporation can obtain for the town and its inhabitants a supply of water, gas and electric light, by authorizing it to build a municipal plant for such purposes, or in place of building a municipal plant to grant to individuals or private corporations, the right to build a plant and serve the town and its inhabitants.

This section make no provision for what shall be charged consumers, public or private, and confers no authority upon the municipal corporation in respect thereto.

The public or governmental powers in respect to rates of charge contained in Sections 471-474 of the Code of 1873 as amended by the 22nd General Assembly were incorporated in Section 725 of the Code, but this power as to rates was limited to the right to "regulate and fix the rent or rate for water, gas, light, or power" and further provided that the power to fix and regulate "should not be abridged by ordinance, regulation or contract."

Up to that time, corporations having less than 7000 inhabitants had express power to make such contracts.

As we have heretofore noted, Chapter 16 of the 22nd General Assembly took away from cities of the first and second class having over 7000 inhabitants, and special charter cities, the right theretofore possessed of contracting as to rates, but did not impair the right conferred by Section 473 of the Code as follows:

"And such cities are authorized and empowered to enter into contracts with the individual or company constructing said works to supply said city or town with water for fire purposes, and for such other purposes as may be necessary for the health and safety thereof, and to pay therefor such sum or sums as may be agreed upon between said contracting parties."

And it must have been a contract of the character referred to in the above quotation which the Legislature referred to in Chapter 16 when it said that the power of regulation of rates should not be abridged by the "passage of an ordinance or resolution on the making of any contract." Section 725 substituted "or contract," for "on the making of any contract," in Chapter 16, 22nd General Assembly, thereby showing an intent to do away with contracts.

Section 725 abrogated the possibility of making any contract which should effect the regulation of rates, for it specifically provided:

"These powers shall not be abridged by ordinance, resolution or contract."

The power conferred by Section 720 upon municipal corporations was *to build a plant to manufacture the supply of gas, electric light, water or heat, which it distributed and retailed.* It *contained no* express power to purchase this supply in place of

manufacturing it, and to distribute the supply so purchased. In other words, if the municipality wanted to furnish itself and its inhabitants it had to build and operate a plant for that purpose.

In 1897 the distribution of gas through small pipe lines at high pressure was practically unknown, and the art of transmitting electricity at high voltage was in its infancy, and had not become a commerial success. Since that time, it has been perfected so that continuous service can be furnished to the small towns from high tension lines at a less expense than the evening lighting service which had theretofore been furnished from small local plants.

As heretofore said, towns owning municipal plants under the strict terms of the statute were required to run their plants and make their supply for distribution for public and private consumption. They had no legislative authority to purchase this supply even if it would enable them to give better service at lower rates. To meet this condition, Chapter 66 of the Acts of the 35th General Assembly was enacted, which permits cities and towns to enter into contracts for a supply sufficient for the complete requirements of its municipal plant, and to retail the supply so purchased. It also gave the cities and towns the right to build transmission lines to connect with the source of supply if they could not induce the person from whom they purchased the supply to make the connections. It also gave them the right to establish rates which it would charge to customers to whom it disposed of this

supply which it had purchased at wholesale .

Chapter 66 of the Acts of the 35th General Assembly of Iowa, approved April 17, 1913 was passed for the purpose of permitting municipalities to purchase a supply of gas, electricity or water for the operation of its municipal gas, electric or water plant, and to dispose of such supply after purchase, and thereby relieve the municipality of the necessity of operating its small local plant at a loss. The heading of the chapter in the official publication of the 35 G. A. is:

> "Authority of cities and towns to contract to purchase heat, gas, water and electric current and to sell the same."

The act is entitled:

> "AN ACT to amend the law as it appears in Section 720 * * * and to authorize cities and towns to enter into contracts to purchase heat, gas and electric current and to sell the same."

The title to the act is entirely silent as to rates.

Section 29 of the Constitution of Iowa provides:

"Every act shall embrace but one subject and the matters properly connected therewith, which subject shall be expressed in the title, but if any subject shall be embraced in the act, which

> shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

so that if the body of the act did authorize a contract as to rates, the same not having been expressed in the title is void.

Chapter 66 aforesaid, deals entirely with operation, service and rates of municipal plants. Section 720 of the 1913 Supplement of the Code pertains entirely to the private powers conferred upon municipal corporations for the carrying on of their regular business, where the corporation as a corporation is one party to a transaction and deals directly either in purchasing current or furnishing service.

Section 720 confers no power to regulate or fix rates.

In Selkirk vs. Sioux City Gas and Electric Co., 176 N. W., 302 (Iowa) on page 303, the court said:

> "Code Section 720 has to do with the power to grant certain rights or franchises for a term of years subject to a vote of the electors. There is no provision in that section for regulating or fixing rates. Section 725 of the statute containing the continuing governmental power of rate making with limitations on the abridgment thereof by ordinance or contract."

In Ottumwa Railway & Light Co. vs. City of Ottumwa, 178 N. W. 905 (Iowa), it was held that the provisions of street railway ordinance fixing the maximum five cent fare, which ordinance was granted by authority of Section 720 of the Code was void because there was no stautory authority conferred upon cities to fix street railway fares.

Whenever a statute is susceptible of two constructions, the one favoring the continuation or retention of the power by the state will be sustained as being the most favorable to the public.

In Freeport Water Co. vs. Freeport, 180 U. S. 587 (45 L. Ed. 679) the state statute authorized the city to grant a franchise for water works, and

> "To authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance for the period not exceeding thirty years."

The company contended that the franchise and its acceptance constituted a contract for the specific franchise rates for the period of thirty years, and the court said:

> "This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all, it can only be by words of positive grant, or something which

is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existance of the power. * * * The city council has authorized to contract with any person or corporation to construct and maintain water works 'at such rates as may be fixed by ordinance, and for a period not exceeding thirty years.' The words 'fixed by ordinance' may be constued to mean by ordinance once for all to endure during the whole period of thirty years; or by ordinance from time to time as might be deemed necessary. *Of the two constructions that must be adopted, which is the most favorable to the public, not that one which would so tie the hands of the council that the rates could not be adjusted as justice to both parties might require at a particular time.*"

The fact that Section 720 of the Supplement to the Code has specified but one condition of the grant of the franchise, to-wit, a limit of twenty-five years, negatives the idea that any other condition may be attached to the grant.

In State ex. rel. N. Y. & N. S. Traction Co. vs. Public Service Commission of New York, 162 N. Y. Supp. 409; P. U. R. 1917-B p. 957, the New York Supreme Court, after calling the attention to the State Constitution, which provides that

"the legislative power of the state shall be vested in the Senate and assembly"

and the clause that

"No law shall authorize the construction or operation of a street railway except upon condition that the consent also of the local authorities having control of that portion of street or highway upon which it is proposed to construct or operate such railway, be first obtained."

said:

"The legislature is prohibited from authorizing the construction or operation of a street railway except upon condition that the consent of the local authorities be first obtained; and the local authorities are prohibited from attaching conditions to the consent which assume to regulate the rate of fare, for the reason that the right to regulate the fares to be charged by public srvice corporation is essentially a legislative function. * * * As well might the legislature disregard the constitutional rights of the local authorities and itself assume to give the constitutional consent as the local authorities assume the constitutional rights of the senate and assembly to regulate regarding the rates of fare. The constitutional provision regarding the giving of consent is a restriction upon the legislature and the consti-

tutional provisions regarding legislation is a restriction upon the local authorities in the matter of attaching conditions and fixing rates of fare."

The constitution of Iowa (Article 3, Legislative Department, Sec. 1) provides "the legislative authority of this state shall be vested in the general assembly." It will be noted that this language is identical with that of the New York statute, and as the regulation of rates is a legislative function, this constitutional provision prohibits its being exercised by any other body than the general assembly, except when power so to do has been expressly delegated by the legislature.

The long settled construction of the Iowa statutes by its highest judicature (the Iowa Supreme Court) is that they do not confer any power or authority upon municipalities to enter into lawful and binding contracts with public utility companys fixing gas, water, heat or electric rates to be charged private consumers, but to the contrary prohibit the making of such contracts by the municipalities.

The facts in the case of Woodward vs. Iowa Railway and Light Company, 178 N. W. (Iowa) decided July 6, 1920, were that the town by ordinance passed by the council and approved by a vote of the electors granted an electric light franchise to the defendant, which ordinance specified the rates to be

charged private consumers for the franchise term of twenty-five years. In stating the question involved, the court said:

> "The essence of plaintiff's contention is that the enactment of this ordinance (including the franchise and the rates and the approval of same by the electors) and the practical acceptance of the same by the utility corporation, constituted a contract binding as such both upon the town and the utility corporation."

The court further said:

> "The defendant resists this contention and likewise denies that there is any power conferred by statute upon the city council to enter into contract on the subject of rates. The issue at this point is the controlling one in the case. The question thus at issue is answered by section 725 of the Code of 1897, which provides as follows:
>
> 'Sec. 725, Regulation of rates and service. They shall have the power to require every individual or private corporation operating such works or plant, subject to reasonable rules and regulations to furnish any person applying therefor, along the line of its pipes, mains, wires, or other conduits with gas, water, light or power, and to supply said city or town with water for fire protection, and with gas, water, light or power for other necessary public pur-

poses. * * * and these powers shall not be abridged by ordinance, resolution or contract.'

"It will be noted from the foregoing that the legislative power to fix rates is conferred by this section upon the city council. The legislative power thus conferred is a continuing one, and may not be abridged or bartered away by contract or otherwise. The same legislative power to enact rates by ordinance is a continuing power to repeal or amend in the same manner. The power thus conferred is subject only to the constitutional limitations that the rates thus enacted shall be reasonably compensatory. There was a time in the history of our legislation when the right to contract as to rates was conferred by statute upon the city council. A comparison of certain sections in the Code of 1873 with our present section 725 is instructive on that question. Section 473 of the Code of 1873 was as follows:

'When the right to build and operate such works is granted to private individuals or incorporated companies by said cities and towns, they may make such grant to inure for a term of not more than twenty-five years, and authorize such individual or company to charge and collect from each person supplied by them with water, such water rent as may be agreed upon between said person or corporation so building said works and said city or town; and such

cities or towns are authorized and empowered to enter into a contract with the individual or company constructing said works, to supply said city or town with water for fire purposes, and for such other purposes as may be necessary for the health and safety thereof, and to pay therefor such sum or sums as may be agreed upon between said contracting parties."

"By Chapter 16th, Acts of the 22nd General Assembly, this right of contract by the city council was taken away from cities having a population of 7000 or more, but was still permitted to cities of lesser population. By the revision and codification of 1897, the right to contract as to rates for utilities of this character was entirely eliminated, and the legislative power to regulate rates was conferred upon the city council in all cases. The reason for the change of method is obvious enough. Under the contract method, the rights of the public were often bartered away either ignorantly or corruptly, and utility corporations became empowered through contractual obligations to enforce extortionate rates. The net result of the progressive legislation is found in our present section 725, whereby it is forbidden to any existing city council to bind the city to any rate for any future time. The power of regulating the rate is always in the present city council. It must be said, therefore, that the rates fixed

by section 6 of the ordinance hereinbefore referred to, were not fixed by contract."

"• • • The constitutionality of the ordinance rates, like the constitutionality of a statute is always open to challenge. Indeed, the only power conferred by the legislature upon the city council is the power to establish reasonable rates and not unreasonable ones. To enact unreasonable rates, therefore, is to exceed, not only its constitutional power, but its statutory power as well. Without dwelling further upon the details of the argument, it is enough to say that the ground herein covered has been fully covered in our previous cases. Cedar Rapids Gas Co. vs. City of Cedar Rapids, 144 Iowa 426, 120 N. W. 966, 58 L. R. A. (N. S.) 1025, 138 Am. St. Rep. 299; Tipton vs. Tipton Light & Heating Co., 176 Iowa 224, 157 N. W. 844; Iowa Railway & Light Co. vs. Jones Auto Co., 182 Iowa 982, 164 N. W. 780; Selkirk vs. Sioux City Gas & Electric Co., 176 N. W. 301."

The facts in Ottumwa Railway & Light Co. vs. City of Ottumwa, 178 N.W. 905 (Iowa) were that the city by ordinance, ratified by the electors, granted the street railway franchise to the plaintiff for a term of twenty-five years, fixing a maximum five cent rate. The question involved was whether, in the absence of statutory authority to fix a permanent street railway fare, the city could do so by incorporating such a provision in the franchise. The

court states the question involved in the following manner:

> "It is very clear that the vital ground upon which the court proceeded (the trial court) rests on the conclusion that the said franchise constituted a binding contract, from which the plaintiff corporation may not be relieved • • • in other words, that the plaintiff has no more right to relief in equity than has anyone who is capable of contracting and has made a valid contract, and finds it a losing venture."

The court further says:

> "Without such clear permission the ordinance may command, but not agree. The power to fix rates is purely governmental and legislative and is in some respects the exercise of a police power. (citing cases).

The conclusion of the court is well expressed in the following paragraphs of the syllabus:

> "The city can not make a contract with a street railroad fixing the rate of fare to be charged, in the absence of a statute granting it the right to make such contract in explicit and convincing terms, even though the making of such contract is not expressly forbidden by any statute."

The court reinstated a temporary injunction, which had been granted originally by the trial court, which injunction enjoined the city from interfering with the company's charging a six cent fare, and which injunction had later been dissolved by the trial court.

The case of Selkirk vs. Sioux City Gas & Electric Co., 176 N. W. 301 (Iowa) was an action by plaintiff on behalf of himself and other gas consumers to enjoin the defendant from putting into effect and collecting increased rates for gas under and amended or new ordinance contrary to the rates fixed in the ordinance amending the franchise. There was a depmurrer to plaintiff's petition which was sustained, and plaintiff appealed. The court said:

> "We think the questions presented have been heretofore determined"

and stated that there were but two questions involved:

> "1st. That the rate ordinance constitutes a binding contract upon the defendant and (2nd) that the new ordinance amends the old one, and this could not be done because the ordinance was not submitted to a vote of the electors when the original ordinance was accepted."

The court said:

"Plaintiff cited Columbus Ry. & Light Co. vs. City of Cleveland, 254 Fed. 499 and Muscatine Light Co. vs. City of Muscatine, 256 Fed. 929."

The court stated that the Cleveland case arose under the statutes of Ohio and followed the rule laid down in Ohio, "which seems to be contrary to the general rule, and is contrary to our decisions." They further said that the case is ruled by Iowa Railway & Light Co. vs. Jones, 182 Iowa 982 (Iowa) and other cases cited, and "that all questions presented in this case are passed upon and decided adversely to plaintiff's contention under the Jones case."

The previous holdings of the Iowa Supreme Court construing Iowa statutes relating to the granting of franchises and the regulation of rates are controlling upon Federal courts in construing such statutes, the Federal courts not having construed such statutes.

The opinion in Raymond vs. Parish of Terrebonne, 28 Fed. 773 was as follows:

"This case was submitted upon an agreement that the facts were to be considered the same as those stated in the opinion of Mr. Jus-

tice Manning in Rabasse vs. Parish of Terrebonne, 30 La. Ann. 287. We are of the opinion that the construction there given of the statute authorizing the issue of the bonds in suit—the additional fact having been found by us that the plaintiff took title after that decision was made public—is binding upon this court; the question in that respect being one of local statute, and not of general commercial law. We are also of the opinion that the construction is correct, provided the questions were new."

State courts have the right to expound the statutes of the state, and having done so, those statues, with the interpretations given to them by the highest court of the state, become the rule of decision in the Federal courts.

The foregoing is an excerpt from the opinion of the Supreme Court in Richmond vs. Smith, (South Carolina), 15 Wallace 429, 21 L. Ed. 200 at page 202.

In Vincennes Bridge Co. vs. Board of Commissioners, 248 Fed. 93, decided December 31, 1917, the Circuit Court of Appeals of the Eighth District held (page 95):

"The national courts uniformly follow the construction of the Constitution and statutes of a state announced by its highest judicial tribu-

nal in all cases that involve no question of general or commercial law and no question of right under the national Constitution or the acts of congress. The character and limits of the powers and liabilities of the municipal and quasi municipal corporations of a state are general questions of state or local law."

In City of Detroit vs. Osborne, 135 U. S. 492, 34 L. Ed. 260, at page 262, the court said:

"Whatever our views may be as to the reasoning or conclusion of that court, is immaterial. It does not change the fact that its decision is the law of the State of Michigan binding upon all its courts and all its citizens and all others who may come within the limits of the State. The question presented by it is not one of general commercial law; it is purely local in its significance and extent. It involves simply a consideration of the powers and liabilities granted and imposed by legislative action upon cities within the state. While this court has been strenuous to uphold the supremacy of federal law, and the interpretation placed upon it by the federal courts, it has been equally strenuous to uphold the decisions by state courts of questions of purely local law. *There should be, in all matters of a local nature, but one law within the state; and that law is not what this court might determine, but what the Su-*

preme Court of the State has determined. A citizen of another state going into Michigan may be entitled under the Federal Constitution to all the privileges and immunities of citizens of that state; but under that Constitution he can claim no more. He walks the streets and highways in that State entitled to the same rights and protection as, but none other than those accorded by its laws to its own citizens."

The holding in Milwaukee Electric Ry. & Lt. Co. vs. Railroad Commission, 238 U. S. 174, 59 L. Ed. 1254, is well stated in the syllabus:

"The construction given by the highest court of the state to the provisions of Wis. Rev. Stat. 198, Sec. 1862, empowering municipalities to grant the use of the streets, to the street railway companies 'upon such terms as the proper authorities shall determine,' as not authorizing a municipality to make a contract which will prevent the future exercise of the authority of the state to fix rates by legislative action, will be followed by the Federal Supreme Court."

The construction placed by the Supreme Court of the State on an act of its state legislature is controlling in the United States Supreme Court, although the result is that the latter court is compelled to hold the enactment unconstitutional and void.

The question involved in Hall vs. De Cuir, 95 U. S. 485, 24 L. Ed. 547, was the validity of a statute of the State of Louisiana which statute had been construed by the Supreme Court of Louisiana as affecting interstate commerce. The Supreme Court said:

> "Such was the construction given that act in he courts below, and it is conclusive upon us as the construction of a state law by the state courts."

The settled construction of the Iowa statutes relating to gas, heating, electric and water franchises and rates is sustained by the decisions of the Federal courts.

In Knoxville Gas Company vs. City of Knoxville, 261 Fed. 283, at page 289 of the opinion, it appears that the legislature granted a special charter to Knoxville, and provided:

> "The mayor and board of aldermen shall have the following powers by ordinance * * * to grant the right of way through the streets for the purpose of street or other railroads, and for such other purposes as the board of aldermen may provide by ordinance."

Prior to the date of the granting of the Knoxville charter, the general assembly provided for a

form of charter for a gas company, which was afterwards amended, and provided further:

> "that no one of the streets or alleys of said city shall be entered upon or used by said company for laying pipes and conductors or otherwise, until the consent of the municipal authorities shall have been first obtained and an ordinance shall have been passed prescribing the terms on which the same may be done."

In 1889, a further statute was passed, providing that one utility should have the right to acquire the property of another utility serving the same territory only by and with the consent of the town and upon such terms and conditions as the municipal government might prescribe. All of these acts were passed prior to 1903, the year in which the Knoxville Gas Company secured its charter.

Section 7 of the franchise ordinance granted by the city to the company in pursuance of the foregoing statutes, provided that the company was to furnish gas of a given candle power within the city at a price of not more than $1.10 per thousand cubic feet, less ten cents per thousand if paid by the tenth of each succeeding month of supply. The rights and consent so given were to continue for a period of fifty years from the date of the ordinance. The company furnished service at the ordinance rate until the fall of 1917, at which time it petitioned the council for an increase in rates, which was not granted, and the council thereafter passed an ordinance fixing penalties for any public utility charging more

than the lawful rate. The company brought its action in the United States District Court, praying the issuance of an injunction restraining the city from enforcing the ordinance rate. Appeal was taken from a decree denying the injunction. Warrington, Circuit Judge, delivering the opinion said:

> "The controlling question is whether in 1903 the city of Knoxville possessed the power *by contract* irrevocably to fix the maximum price of gas for a term of fifty years. If the city in reality had the power, the decree must be affirmed.
>
> "We assume that the passage of the ordinances by the city and their acceptance by the company in 1903 amounted to a binding contract between the parties as to all matters falling clearly within their respective corporate powers. In view, however, of the issue touching the price-fixing feature, it is necessary to consider whether the city could by contract of substantial duration and providing a maximum price for the supply of gas, bind the gas company, on the one hand, to accept this price in the face of intervening changes in conditions fairly calling for distinct increase in price, and commit the inhabitants of Knoxville and the municipality itself, on the other hand, to pay the price (for such quantities of gas as they might use) in spite of conditions obviously justifying material reduction in price. This is what the power

claimed means; and the far-reaching consequences that well might attend its execution, as respects both the consumer and the company, certainly demand the closest scrutiny into the disputed existence of the power.

"The power to establish prices to be charged by public service corporations, whether it is to be exercised by regulation or by contract, resides primarily in the state—here the state of Tennessee. Admittedly it is capable of being delegated by the legislative branch of a state to its municipalities. * * * It is enough for present purposes to say that the character of the power is governmental, and that the consequent importance of conserving it is manifest; indeed, in the absence of specific provision to the contrary, it is to be interpreted as a power continuing in nature and incapable of being bartered away. Can it be safely said, then, that the state of Tennessee has both surrendered part of its own power, and, in effect, authorized the city of Knoxville to exercise it by contract? The settled federal rule in respect to both these features is exacting, and need not be misunderstood; it requires that the intent of the state so to give up a portion of its power must appear in explicit and convincing terms—in plain words—and that doubtful expressions shall be resolved in favor of the state."

The court quoted from Mr. Justice Moody in Home Teleph. and Teleg. Co. vs. Los Angeles, 211 U. S. 265, 53 L. Ed. 176, as follows:

> "Authority to make prices by contract, or even by way of regulation, touching the supply of gas, is nowhere expressed among the municipal powers. Thus the claim of power in the city to, agree upon a price for gas supplied throughout the life of the ordinance in 1903, must at least rest on the right created in the city in general language to impose terms and conditions of its consent to use the highways, rather than upon language specifically authorizing it either to regulate prices or to agree upon a price. *The effect of such a claim is to ask that there be read into the statutes language which the legislature did not see fit to enact.*

And further, on page 291, the court said:

> "The dominating principle of these decisions is that municipalities will not be regarded as possessed of the right to bind themselves to a public service rate and term, except only under statutes granting to them express power to contract or agree as to such rates and time."

And on page 296:

> "The controlling question, therefore, is as stated in the opening of the opinion, whether in

1903, the city of Knoxville was clothed with power to enter into a contract irrevocably to establish the maximum price of gas for a term of fifty years. If the considerations above given to the subject are at all correct, it is perfectly plain that the question must be answered in the negative. It was consequently error in the court below to treat the provision fixing the price of gas as an irrevocable feature of the accepted ordinance. This was to ascribe to the city a contractual power which the *state* had not surrendered after all. The failure of the state to confer such power on its municipalities was purely a matter of legislative policy, and hence must be accepted as conclusive."

The powers conferred by Section 725 of the Supplement of the Code upon municipalities in respect to rates is governmental in character, to be exercised by legislation, and is continuous, so that one city council may not bind itself or its successor councils to any definite rate for any definite length of time.

The distinction between the governmental powers of a municipality by which it governs itself and its people, and its business powers exercised for a private advantage of the municipality as a legal personality, are well set forth in Illinois Trust & Sav-

ings Bank vs. City of Arkansas City, 76 Fed. 271 at page 282:

> "First, it ignores the settled distinction between the governmental, or public, and the proprietary, or business powers of a municipality, and erroneously seeks to apply to the exercise of the latter, a rule which is only applicable to the exercise of the former. A city has two classes of powers—the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other, proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city, and of the city itself as a legal personality. In the exercise of the powers of the former class, it is governed by the rule here invoked. In their exercise it is ruling its people and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class, it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation. Dill. Mun. Cor. (3d Ed.) Sec. 66 and cases cited in the note; Safety Insulated Wire & Cable Co. vs. City of Baltimore, 13 C. C. A. 375,

377, 378, 66 Fed. 140, 143, 144; San Francisco Gas Co. vs. City of San Francisco, 9 Cal. 453, 468, 469; Com. vs. City of Philadelphia, 132 Pa. St. 288, 19 Atl. 136; New Orleans Gaslight Co. vs. City of New Orleans, 42 La. Ann. 188, 192, 7 South 559, 560; Tacoma Hotel Co. vs. Tacoma Light & Water Co., 3 Wash. St. 316, 325, 28 Pac. 516, 519; Wagner vs. City of Rock Island, 146 Ill. 139, 154, 155, 34 N. E. 545, 548, 549; City of Vincennes vs. Citizens Gaslight Co., 132 Ind. 114, 126, 31 N. E. 573, 577; City of Indianapolis vs. Indianapolis Gaslight & Coke Co., 66 Ind. 396, 403; Read vs. Atlantic City, 49 N. J. Law 558, 562, 9 Atl. 759. In contracting for waterworks to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative power, but its business or proprietary powers. The purpose of such contract is not to govern its inhabitants but to obtain a private benefit for the city itself and its denizens. 1 Dill. Mun. Corp., Par. 27; City of Cincinnati vs. Cameron, 33 Ohio St. 336, 367; Safety Insulated Wire & Cable Co. vs. City of Baltimore, supra, and cases cited under it."

Section 725 confers public or governmental powers to be exercised by legislation for the regulation of transactions between public service companies and their patrons, to which the municipality is not a party. This section confers public powers.

In 4 McQuillin, Sec. 1736, the rule is stated:

> "The regulation of rates for public service belongs to the police power of the state • • • municipal corporations have only such portion of police power as are granted to them by the legislature in express terms or by necessary implication."

In the city of Tipton vs. Tipton Light & Heat Co., 176 Iowa 224, the question at issue was the validity of an ordinance fixing maximum rates for light and power. On page 227, the court said:

> "Section 725 of the Code of 1897 gives to cities, such as this plaintiff, power to regulate the rates to be charged for service rendered by corporations, such as this defendant. • • • The right of the state to delegate to municipalities the power therein conferred is not questioned. • • • The passage of the ordinance is a legislative act."

And again on page 230:

> "The act of a municipality in fixing a rate is purely a legislative act, done by virtue of the authority given by the legislature."

And further on page 237, the court quotes Section 913 of Abbott on Municipal Corporations, as follows:

"'Where municipal or quasi public corporations possess the power of regulation, an exercise of that power is legislative in its character.'"

On page 238, the court quoted from Dillon on Municipal Corporations, 5th Ed., Vol. 3, Sec. 1325, as follows:

"'The regulation of rates is governmental in its nature, and the power is intended to be exercised for the benfit of the inhabitants of the municipality.'"

And on page 239, the court said:

"A distinction must be kept in mind between the *power to regulate rates and the power to contract as to rates.* The regulation of rates for public service belongs to the *police power of the state,* and when delegated to the city, it belongs to the *police power of the city.*"

In Gas Light Company vs. Cedar Rapids, 144 Iowa 426, on page 431, the court said:

"The act of the municipality in fixing rates is purely legislative and as it is by virtue of authority given by the legislature, is presumed to have been in the proper exercise of the power conferred. City of Knoxville vs. Knoxville Water Co., 20 Sup. Ct. 148."

In Pioneer Teleph. Co. vs. State, et al. (Oklahoma), 127 Pac. 1073, the facts were that the state conferred power upon cities to authorize the "construction and maintenance of * * * telephone wires along or through the streets and alleys within the corporate limits and to grant franchise rights to corporations for such purposes and *to regulate same.*"

The court said:

> "The power to authorize the construction and maintenance of telephone wires along and through the streets and alleys and to grant franchise rights to corporations for such purposes, whatever else it means, certainly contains no grant of power to the municipality to fix telephone rates by franchise, or otherwise, and as part consideration therefor, as is here attempted. All the grant of power therein contained, that we can see, is the power to grant by franchise the right to construct and maintain telephone wires along the streets and alleys of the municipality under such terms of *police regulation* as may be from time to time ordained by the city."

The court further said:

> "They have no power to exact or receive compensation by way of free telephone service * * * or to fix rates for telephone charges."

In Home Teleph. & Teleg. Co. vs. Los Angeles, 53 L. Ed. 176, the facts were that the state of California had granted a special charter to Los Angeles, which gave the council power "by ordinance * * * to regulate telephone service within the city * * * and to fix and determine charges for telephones and telephone connections." The court said:

> "This is ample authority to exercise the governmental power of regulating charges but it is no authority to enter into a contract to abandon the governmental power itself. It speaks in words appropriate to describe authority to exercise the governmental power but entirely unfitted to describe the authority to contract. It authorizes command but not agreement. Doubtless an agreement as to rates might be authorized by the legislature to be made by ordinance, but the ordinance here described was not an ordinance to agree upon charges but an ordinance 'to fix and determine the charges.' It authorizes the exercise of governmental power and nothing else. We find no other provision in the charter which by any possibility can be held to authorize a contract upon this important and vital subject."

In Town of Williams vs. Iowa Falls Elec. Co., 170 N. W. 815 (Iowa), the court said:

"The power to fix rates is purely governmental and legislative (citing cases). The fixing of rates by ordinance is in a sense an exercise of police power. Wherefore a fine is enforcible for violating the provisions of the ordinance."

In Selkirk vs. Sioux City Gas & Elec. Co., 176 N. W. 301 (Iowa), the court said:

"Section 725 is the statute containing the continuing governmental power of rate making with limitations on the abridgment thereof by ordinance or contract."

Neither the defendant city nor the plaintiff company were bound by the rates for the three year term referred to in Section 3 of the franchise ordinance.

The question in Iowa Railway and Light Co. vs. Jones, 164 N. W. 780 (Iowa), was whether one city council, by fixing a specific heating rate in a franchise ordinance, thereby deprives its successor council from authority to change that rate during the term for which the rate was fixed. The successor council changed the rate fixed in the franchise without submitting the new ordinance changing the rate to the legal voters for approval. The court said:

"The power (the right to regulate rates conferred by Section 725) is a continuing one,

and one city council may not tie up its successors by anything it may do in the matter covered by this statute. The grant of such a franchise is by the city council even though its approval by the electors of the municipality is essential to its validity. Section 776 of the Code. And the rates for service therein specified are subjct to subsequent adjustment as this may be deemed expedient or necessary by the city council."

In Ottumwa Railway & Light Co. v. City of Ottumwa, 178 N. W. 905 (Iowa), at page 906, the court said:

"That statute (Section 725) in positive terms forbids any abridgment of the right to regulate and fix the charges of service corporations named in the statute, either by ordinance, resolution or contract. No one would now contend in the teeth of the statute prohibition that there can be a valid contract fixing permanent rates. As to the corporations named in the statute, we have held repeatedly that there can be no contracting that rates for service shall not be changed."

And in referring to the Jones case, 164 N. W. 780, the court said:

"It is held that the fixing of maximum rates in a franchise ordinance is therefore not a con-

ract that such rates may not be changed before the time stated in said ordinance has elapsed, and that the approval by the electors of the rates in the franchise is merely an approval of the rates fixed by the franchise as rates temporarily settled, with the understanding that the same may be changed either upward or downward."

The facts in Town of Woodward vs. Iowa Railway & Light Co., 178 N. W. 549 (Iowa), were that the plaintiff by ordinance duly approved by a vote of the electors as required by Section 720 of the Code, granted an electric light franchise to the defendant for 25 years, which specified rates for the franchise term. The question involved was whether these rates, if confiscatory, were binding upon the company. The court, after quoting Section 725 of the Code, said:

"It will be noted from the foregoing that the legislative power to fix rates is conferred by the section upon the city council. The legislative power thus conferred is a continuing one and may not be abridged or bartered away by contract or otherwise. The power thus conferred is subject only to the constitutional limitation that the rates thus enacted shall not be confiscatory or unreasonable, but shall be reasonably compensatory."

And continuing the court recites the history of the Iowa legislation culminating in Section 725, and says:

> "The net result of the progressive legislation is found in our present Section 725, whereby it is forbidden to any existing city council to bind the city to any rate for any future time."

The court held that the company was not bound by the rate provisions in the franchise, and further said:

> "Indeed the only power conferred by the legislature upon the city council is a power to establish *reasonable rates* and not unreasonable ones. To enact unreasonable rates therefor is *to exceed not only its constitutional powers but its statutory powers, as well.* (Citing cases)."

The defendant's allegation in its Amended and Substituted Answer (Record page 42) "that an acceptance of the franchise made a valid and binding contract for rates therein fixed until the expiration of the three year period, unless sooner changed by the city council under and by virtue of its power to fix and regulate rates, as provided by statute" is an admission that the alleged contract is void for want of mutuality.

In Iowa Railway & Light Co. vs. Jones, 164 N. W. 780, the Iowa Supreme Court held that the rate provisions of a franchise ordinance, which ordinance was duly accepted by the company, were not binding upon the town, but that the city council could change the rate at pleasure.

In Town of Williams vs. Iowa Falls Elec. Co., 170 N. W. 815 (Iowa), at page 816, the court said:

> "The proposition that nothing is, in the true sense, a contract unless there is a reciprocal obligation, and unless the alleged contract is binding on both, has the approval of numerous decisions in the Supreme Court of the United States, those of other federal courts, and of courts of last resort in many of our sister states."

We refer to the following authorities:

The case of Usher vs. Livermore, Vol. II, Cole's Iowa Reports, page 117, was an action by plaintiff for performance of a contract to convey real estate. A decree was rendered dismissing the plaintiff's bill at his cost, which decree was affirmed. A statement of facts is not necessary in order to understand the principle laid down in the decision. The court said:

> "The case seems to be rather a strong instance of a call on the court to *make* contracts for the parties, or perhaps violate them. In

any view which can be taken of it, at this period of the transaction, there is a difficulty arising from the want of mutuality. Livermore holds nothing to be enforced against Usher. To give the contract any vitality after the time prescribed, at least, if not before, there should be a power of enforcing it against Usher as well as against Livermore, but it is entirely one-sided."

13 Corpus Juris, pages 331 and 332 is as follows:

"Mutuality—(1) In general, mutuality of contract consists in the obligation on each party to do, or to permit something to be done, in consideration of the act or promise of the other. Contracts lacking in mutuality are often termed unilateral contracts. Mutuality of obligation is an essential element of every enforcible agreement. Mutuality is absent when only one of the contracting parties is bound to perform, and the rights of the parties exist at the option of one only."

The case of Dorsey vs. Packwood, 12 Howard 126, 13 L. Ed. 921, was an action by the plaintiff for the specific performance of a contract in writing by which the defendant Packwood then being the owner of a certain plantation and equipment thereof agreed with said Dorsey that as soon as Dorsey should pay one-half of the cost of the property

either with his own private means or with one-half of the profits of the plantation, Packwood would convey and transfer to Dorsey one-half of said plantation and equipment.

But the said contract also provided that it was agreed and understood by Dorsey that Packwood should have the right and privilege of selling and disposing of the plantation in any way that he saw fit without consulting or asking the consent of Dorsey and that Packwood should have the control of the plantation until sold, but in case of sale by Packwood at any time before the transfer to Dorsey, he should be answerable to Dorsey for one-half of the net profits of the sale. The United States Circuit Court, upon a hearing, dismissed the plaintiff's bill, and Dorsey appealed to the United States Supreme Court where the dismissal decree was affirmed. In the course of the opinion delivered by Mr. Justice Crier at page 926, is the following:

> "There is no allegation in the bill, or proof, that any clause was omitted from this instrument, either through mistake or inadvertence. It is signed by both parties in the presence of attesting witnesses; and is expressed in clear and precise terms. But there is one characteristic necessary to give it validity as a binding contract, in which it is entirely deficient. It wants mutuality. It imposes no obligation on Dorsey whatever. He is not bound either to render services or to pay money as a consideration for one-

half the land. Packwood could not support a suit upon it to compel Dorsey to do anything. It is not an alternative obligation, because Dorsey is not bound to perform either alternative."

In Rutland Marble Co. vs. Ripley, 10 Wall. 339, 19L. Ed. 955, the court said:

"Another reason why specific performance should not be decreed in this case, is found in the want of mutuality. Such performance by Ripley could not be decreed or enforced at the suit of the Marble Company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on giving one year's notice. And it is a general principle that when—from personal incapacity, the nature of the contract, or any other cause—a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former. Fry, Specific Performance, Sec. 386."

In Nichol vs. Wetmore, 156 N. W. 319 (Iowa), an action was brought to recover $150 which the plaintiff deposited with the defendant as an advance payment on an alleged contract by which the plaintiff was to order from the defendant certain Hudson

automobiles. The defendant filed a counterclaim for damages on account of failure of the plaintiff to purchase and take five Hudson cars, upon each of which the defendant would have realized a profit of $80.00 and by reason of which failure the defendant was damaged to the sum of $400.00. The petition and counterclaim were both diesmissed and both parties appealed. Affirmed on defendant's appeal and reversed on plaintiff's appeal. The court said:

> "The written contract is upon its face incomplete. It will be seen that Section One thereof is simply a general promise to sell Hudson cars to the sub-dealer for a specified purpose without stating the number of cars, price or time of delivery. In Section Five is a clause which governs the price at which sales will be made, but neither the number of cars nor the time of delivery is provided for. Sections Twelve and Thirteen do state the number of cars under consideration by the parties, but plaintiff's agreement to accept and pay for the cars is restricted to the specifications in an 'attached schedule' and, as we have seen, no such schedule appears ever to have been made or attachd to the writing. Again, even if the schedule had been agreed upon and attached to the writing, Section Fifteen appears to make performance of such an agreement on the part of the defendants subject to so many exceptions and contingencies as to deprive their promise of any practical en-

forcible quality. The same contract was recently considered by the South Dakota court upon issues practically identical with those in the present case, and it was there held that the agreement was manifestly incomplete and that the dealer could not rightfully retain the deposit made by the sub-dealer or set-off against a demand for its return the anticipated profits which would have been made had the proposed sales to the sub-dealer been, in fact, effected. The court speaks of the alleged contract as a 'jug-handled' affair by which, even if it had been complete, there was no mutuality of enforcible obligation. Rosscenius vs. Wetmore (S. D.), 153 N. W. 937. By Section Three of the instrument, defendants reserved the absolute right of cancelling the same, if at any time, in their judgment, plaintiff was not properly promoting the sale of their cars, but no corresponding right was reserved to the plaintiff, and, while by Section 13 they seek to bind the plaintiff to an absolute duty of receiving and paying for a given number of cars, they provide practical immunity for themselves against liability for failure to deliver on demand. That contracts of this nature are clearly lacking in mutuality has been held in Velie vs. Kopmeier, 114 C. C. A. 284, 194 Fed. 324; Oakland vs. Ind. Auto Co., 131 C. C. A. 319, 201 Fed. 499; and Goodyear vs. Koehler, 159 App., Div. 116, 143 N. Y. Supp. 1046."

To a like effect are the holdings in Great Northern Ry. Co. vs. Cheyenne Telephone Co., 140 N. W. 1062. In this last case, the court said:

> "It is a fundamental principle true of law, that contracts in order to be binding must be mutual. * * * Taking into consideration the whole contract, we are of the opinion that by reason of want of mutuality the contract is under the circumstances unenforcible."

Oakland Motor Car Co. vs. Indiana Automobile Co., 201 Fed. 499.

Tweedie Trading Co. vs. Parlin Orendorff Co., 204 Fed. 50.

Ellis vs. Dodge Bros., 207 Fed. 860.

In this last case, the court said:

> "Under either view of the contract, therefore, its provisions are unilateral and can not be enforced for unexecuted portions thereof."

The holdings are unanimous that the right to cancel or terminate destroys the mutuality of contract.

13 Corpus Juris, pages 337, 338.

Nichol vs. Wetmore, 158 N. W. 119.

Great Northern Ry. Co. vs. Cheyenne Teleph. Co., 145 N. W. 1062.

Ellis vs. Dodge, 237 Fed. 860.

The only rates which the city council may fix are fair and reasonable rates.

In Des Moines vs. Water Co., 95 Iowa 198, the city contended that it had an absolute right to fix "an absolute standard of rates." The court held that Section 725 must be held to authorize the fixing of reasonable rates, and cited with approval Stone vs. Trust Co., 116 U. S. 307, and the following quotation therefrom:

> "This power to regulate is not a power to destroy, and limitation is not equivalent to confiscation. Under a pretense of regulating fares and freights, the state can not require a railroad corporation to carry persons or property without reward. Neither can it do that which amounts to taking of private property for public use without just compensation or without due process of law."

In City of Tipton vs. Tipton Light & Heat Co., 176 Iowa 224, on page 228, the court said:

> "By express provision the legislature has delegated the right to regulate and fix the rent or rates that may be charged. * * * In fixing these rates due regard must be had to the fact that these corporations are entitled to reasonable remuneration for services rendered."

In Town of Williams vs. Iowa Falls Electric Co., 170 N. W. 816, the Supreme Court of Iowa said:

> "The rates must at all times be reasonable, fair, adequate and non-confiscatory, since the municipality may not use its governmental power to confiscate, or the service company demand excessive rates."

In Town of Woodward vs. Iowa Railway and Light Co., 178 N. W. on page 557, the court expressly declared that the city council's power to establish rates was limited to establishment of reasonable rates and said:

> "Indeed the only power conferred by the legislature upon the city is the power to establish reasonable rates, not unreasonable ones."

In Cedar Rapids Water Co. vs. Cedar Rapids, 118 Iowa 234, on page 259, the court said:

> "If the defendant assumes to exercise its right to prescribe the schedule, the rates so fixed by it must not be arbitrary or destructive of the property employed in its service. The right to regulate is not unlimited and if the schedule be made so low that its adoption will operate as a confiscation of the water company's property without due process of law, the courts will interfere to prevent its enforcement."

The void rate clause in a franchise does not bind grantee on account of grantee's acceptance of the franchise as a whole.

In Cedar Rapids Water Co. vs. Cedar Rapids, 118 Iowa 234, on page 241, the court said:

> "A contract made in violation of law can not be enforced is elementary. The same is true of any contract of a municipal corporation for which there is no express or implied authority."

And on page 255, the court further said:

> "But if the authority to do the act of making the contract is expressly withheld or denied by law, that fact may always be set up as a defense to an action brought thereon."

The facts in State vs. Telephone Co., 173 Iowa 497, were that the town of Chariton had granted a franchise to the telephone company to build an exchange at a time when the statutes did not confer such authority upon the town. The ordinance was accepted by the company and the exchange built. The town claimed that the defendant company was estopped from pleading the invalitity of the franchise. The court said:

> "It (the town) had no power to grant the telephone company a charter in the year 1894, and its act in so doing was ultra vires and void.

> The acceptance of the ordinance did not estop it from claiming no valid legislative grant by the city."

In Town of Williams vs. Iowa Falls Electric Co., 170 N. W. 815 (Iowa), on page 816, the court said:

> "Next it is urged that this is not changed by any estoppel arising from the fact that the service company has proceeded under the franchise grant. This is held in State vs. Chariton Teleph. Co., 173 Iowa 497, 155 N. W. 968, and in many decisions by the Supreme Court of the United States and of other courts of high standing."

In California National Bank vs. Kennedy, 167 U. S. 362, at page 367, 42 L. Ed. 198, at pages 200, 201, 202, the question involved was whether a banking corporation could set up the invalidity of a contract which was ultra vires where it had been performed and they had still in their hands fruits of the transaction. The lower court held that they were estopped from denying liability on an ultra vires act. On Writ of Error to the Supreme Court of the United States, the ruling was reversed, and the court in the opinion says:

> "A contract of a corporation, which is ultra vires, in the proper sense, that is to say, outside the object of its creation as defined in the

law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract can not be ratified by either party, because it could not have been authorized by either. *No performance on either side can give the unlawful contract any validity,* or be the foundation of any right of action upon it."

"As is said in McCormick vs. Market Nat. Bank, 165 U. S. 550:

" 'The doctrine of ultra vires, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of anyone contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law. Pearce vs. Madison & I. R. Co., 62 U. S. 21, How. 441 (16:184); Pittsburg, C. & St. L. R. Co. vs. Keokuk & H. Bridge Co., 131 U. S. 371, 384 (33:157, 161); Central Transp. Co. vs. Pullman Palace Car Co., 138 U. S. 24, 48 (35: 55, 64).

"The doctrine thus enunciated is likewise that which obtains in England. Asbury Carriage & Iron Co. vs. Riche, L. R. 7 H. L. 653; Attorney General vs. Great Eastern R. Co., L. R. 5 App. Cas. 473; Wenlock vs. River Dee Co., L. R. 12 App. Cas. 354; Trevor vs. Whitworth, L. R. 12 App. Cas. 409; Ooregum Gold Min. Co. vs. Roper (1892), A. C., 125; Mann vs. Edinburg Northern Tramways Co. (1893), A. C. 70."

Particular attention is directed to the following paragraph in the above quotation:

"The contract can not be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action on it."

The following cases are to the same effect:

Merchants Nat'l Bank vs. Wehrman, 202 U. S. 295, 50 L. Ed. 1036.

Central Transp. Co. vs. Pullman Pal. Car Co., 139 U. S. 24, 35 L. Ed. 55.

Refrig. M. Co. vs. German Sav. Inst., 44 L. Ed. on page 71.

West Penn. Chem. Co. vs. Prentiss, 236 Fed. at page 895.

Bank vs. Converse, 200 U. S. 426, 50 L. Ed. 537.

Bassick vs. Etna Exch. Co., 246 Fed. 974.

McCormick vs. Bank, 165 U. S. 538, 41 L. Ed. 817.

In Cedar Rapids Water Co. vs. Cedar Rapids, 118 Iowa 234, the franchise undertook to confer rights for a longer term than 25 years, the right of the city to grant a franchise being limited to 25 years. The court said:

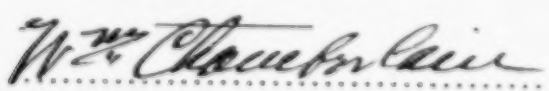
> "The invalidity of the ordinance provision referred to does not, however, effect a grant for the term of 25 years. It is entirely severable from the grant which the city was authorized to make and did make. * * * Where the contract is severable and one part or provision is void, the void provision may be rejected and the contract enforced as to the remainder."

In Cargill vs. Minn., 45 L. Ed. 619, 180 U. S. 452, the holding of the court is well expressed in the syllabus:

> "The acceptance of a license under a state law does not impose upon the licensee any obligation to respect or to comply with any provisions of the statute or any regulations prescribed by the state authorities that are repugnant to the Constitution of the United States. * * * The license will give the defendant full authority to carry on its business in accordance with the valid laws of the state and valid rules and regulations prescribed by the commission."

In closing, counsel would say that the question involved is purely the construction of a state statute. That this statute has been construed and passed upon in a long line of cases by the supreme judicature of the state of Iowa, culminating in the Williams and Ottumwa cases; that the unanimous holding of that court has been that the Iowa statues do not confer upon cities or towns any express or implied right to contract with a utility company as to rates. That Section 725 of the Code confers a right to regulate rates by ordinance, not by agreement; that the language is the language of command, and also that this section specifically prohibits the making of contracts in relation to rates, and that any alleged contract as to rates between a municipality and any public utility company is void, and either party has a right to plead this invalidity; that the Federal courts, not having construed this section, are bound by the construction given to it by the Iowa Supreme Court—and further that the decisions of the Federal courts upon similar statutory provisions are to the same effect as holdings of the Iowa Supreme Court upon the statute involved here.

Respectfully submitted,



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COPY

Supreme Court of the United States

October Term, 1920

No. 189

IOWA ELECTRIC COMPANY,
Appellant,
vs.
CITY OF FAIRFIELD, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA

John A. Reed, William Chamberlain and Ralph Maclean,
Attorneys for Plaintiffs, Appellant.
X. C. Nady and Ralph Munro,
Attorneys for Defendants, Appellees.

APPELLANT'S REPLY ARGUMENT

Appellant in its brief and argument called the court's attention to the fact that the only point in this case was:

> "Has a city council authority under the statutes of Iowa, to enter into a contract with a public utility company, furnishing gas service,

fixing the prices to be charged for said gas service by said company for a definite period of time?'

The appellee admits that this question is answered in the negative by the Supreme Court of Iowa in the Town of Woodward vs. Iowa Railway & Light Company, 178 N. W. 549, and in the Ottumwa Railway & Light Company vs. City of Ottumwa, 178 N. W. 905, on two grounds:

First: That without express statutory authority a municipality did not possess the power to enter into such a contract and such express statutory authority had not been conferred.

Second: That the making of such a contract was expressly prohibited by Section 725 of the Supplement to the Code.

The appellee undertakes to evade the force of these decisions. In respect to the Woodward case it says, in effect, that it is an ill-advised and an ill-considered opinion. It forgets that the Woodward case is without dissent and is but the culmination of a long line of previous holdings collated by the court itself in the Town of Woodward case when the Supreme Court says:

> "Indeed the *only* power conferred by the legislature upon the city council *is the power to establish reasonable rates* and not unreasonable ones. To enact unreasonable rates therefore, is to exceed, not only its constitutional power but its statutory power as well. * * * It is enough to say that the ground herein covered has been fully covered in our previous cases. Cedar Rapids Gas Co. vs. City of Cedar Rapids, 144 Iowa,

426, 120 N. W. 966, 48 L. R. A. (N. S.) 1925, 138 Am. St. Rep. 299; Tipton vs. Tipton Light and Heating Co., 176 Iowa, 224, 157 N. W. 844; Iowa Railway & Light Co. vs. Jones Auto Co., 182 Iowa, 92, 164 N. W. 780; Selkirk vs. Sioux City Gas & Electric Co., 176 N. W. 301.

This line of cases covers a period of more than 12 years. Also the Woodward case is the last of a series decided by the Supreme Court with the same judges sitting as decided the Woodward case. We refer to the Jones Auto, Selkirk, Town of Williams, Town of Woodward and Ottumwa cases.

The force of the Ottumwa decision is swept aside by a mere statement that a re-hearing has been applied for. This is true but it is an application for re-hearing under circumstances, the like of which has never been known to Iowa practice and is without authority of statute or rule or precedent of the Iowa Supreme Court. It is a petition for *a rehearafter or upon a rehearing.*

The opinion of the court upon the original submission of the Ottumwa case appears at 173 N. W. 270. Afterwards the appellant applied for a re-hearing which upon argument was granted and the case ordered re-argued and re-submitted, which was done. The opinion upon re-submission appears at 178 N. W. 905 and now the appellee is asking for a second re-hearing. The re-hearing which is now applied for is not upon the ground that the court erred in holding, in both decisions, that a municipality has no power to contract as to gas and electric rates

without express statutory authority or that Section 725 of the Code prohibited the making of such a contract. The basis of the claim of error is that since the legislature has in Section 725 by statute denied the right to councils to make contracts relative to gas, electric, water and heat rates and as street car service was not included in the prohibition the legislature thereby conferred power upon or declared that cities had a right to contract as to street car rates because not expressly prohibited, and the granting of a re-hearing would not affect the force of the previous holdings in the Ottumwa case upon the issues in this case, nor the construction of Section 725.

Division 1. (*Appellees brief P.* 5.) *Have Iowa cities power to contract as to rates.*

Code Section 720 *is not the section which authorizes the city to fix rates* and the argument in support of the claim that it authorizes the fixing of rates by contract is made directly in the face of the Iowa decisions above referred to and begs the question by attempting to demonstrate by cases like the Manitowoc case, 129 N. W. (Wis.) 929, that this Iowa statute authorizes a contract when in point of fact these cases are authority only on the rule that if a statute grants a city express authority to contract it may do so. A proposition that is today a settled truism and hardly worth discussing and having no bearing whatever on whether the Iowa statute does

or does not confer such right.

It also cites in support of its contract theory the opinion in the Muscatine Light Company case 256 Fed. 929—the very opinion on which the decision in the instant appeal was rendered and of which this appeal complains.

These cases are all similar to City of Moorehead vs. Union Light H. & P. Co., 255 Fed. 920, which is as follows:

> "The city has a home rule charter adopted by the vote of the people. That charter provides that every ordinance by which a council proposes to grant any franchise shall contain all the terms and conditions of the franchise, and it shall be a feature of every franchise so granted that the maximum price of service shall be stated in the grant" * * * "*held* that the franchise was a contract on the theory that "when cities are expressly vested with power to enter into *contracts as to rates*, it is now established by repeated decisions of the Supreme Court that such contracts are binding."

It is difficult to see how decisions that a town may make such contract if it has express statutory authority so to do, prove that it has that authority under an Iowa statute which by speaking specifically denies the authority. (See appellant's brief, page 22.)

That the utility company is not here estopped by its acceptance of the franchise we believe is demonstrated in Divisions 9 and 11 of appellant's brief. The situation here is different from the sit-

nation in the cases cited by the appellee. In those cases the authority of the body passing the law which it was afterwards sought to hold unconstitutional was unquestioned and it had the right to give or refuse permission to act within any limitations it saw fit to impose while here the ultimate law making power has definitely prescribed that a subordinate legislative body may only have authority to grant or deny a particular right without the interposition of limitations. This is a situation akin to the situation in the Cargill case cited in appellant's brief at page 96 where this court spoke definitely as to the limitations upon the law making power of states and held that one who has availed himself of a right under a state law containing limitations, unconstitutional under the constitution of the United States, would not be estopped to claim such limitations void.

There is a clear distinction in the application of the principle of estoppel between cases where (a) a town has a lawful right to contract in respect to the subject matter of the agreement and (b) cases where the town does not possess any right or power to enter into a contract, but its act is ultra vires.

In cases where the town has the power to make the contract but has done so informally or without complying with all of the requisites necessary to be done and performed to make a binding contract, the other party, after accepting the benefits, is estopped to deny the power of the town to make the contract or its validity. But where the town has no power to enter into the contract but its act is wholly ultra

vires the Iowa and the Federal courts have consistently refused to confer that power by the application of the principle of estoppel. See Town of Williams vs. Iowa Falls Electric Company, 170 N. W. 815; State of Iowa vs. Chariton, 173 Iowa 699; California National Bank vs. Kennedy, 42 L. Ed. 98.

Division 2. Is the ordinance rate a contract,

Here again the appellee begs the question by the citation of cases which in effect hold that it was once the law in Iowa and may now be the law elsewhere that such contracts could be legally made and that where legally made they are not against public policy. It is worthy of note that all the Iowa cases here cited simply enforce appellant's contention that the city has no authority to do anything except to exert its legislative functions to fix reasonable rates, except the decision in the Le Mars case, 131 Iowa 14, in which the court held that a certain franchise granted under the Iowa law prior to the enactment of the Code of 1897 constituted a contract—but this was at a time when municipalities had statutory authority to make such contract and before the enactment of Section 725.

Division 3. Power to regulate rates is governmental.

(A) Here we have again the assumption that if the city council refuses to grant new rates when the

rates in force are confiscatory the person furnishing the service has no relief unless it be by mandamus but this question was settled by Judge Evans in the Woodward decision when he said:

> "The contention that the presumption of reasonable rates necessarily continues until new ordinance rates are adopted cannot be sustained. To sustain such contention would be to hold that the utility corporation has no remedy, whatever the facts might be, if the city council refused to amend the rates. *The constitutionality ofthe ordinance rates, like the constituionality of a Statute, is always open to challenge. Indeed, the only power conferred by the Legislature upon the city council is the power to establish reasonable rates and not unreasonable ones...*To enact unreasonable rates, therefore, is to exceed, not only its constitutional power, but its statutory power as well;"

and then granted injunctional relief as prayed.

The only case cited by appellee to sustain this proposition from this court is Inter State Commerce Commission vs. Railway, 42 L. Ed. 243, which was an attempt by the Commission by mandamus to compel a railway company to be governed in its future conduct by rates then prescribed and the relief was denied, which is certainly not authority that equity will not interfere to prevent a confiscation of property where, as here, there has been no jurisdictional attack and it is definitely shown by the record and by appellant's brief that the sum of money, or the right involved, is of the value of Fourteen Thousand Dollars ($14,000.00).

(C) The Benwood case cited here is not a holding that the city council has both authority to irrevocably fix rates by contract and to regulate them at the same time by legislative enactment but merely holds that legislative power reserved in a state may make such changes possible where the statute granting the city power to make the contract expressly reserved the right in the state to do so.

(E) And here again we meet with a curious attempt to make use of the cases which hold that a contract may be entered into to support the theory that the Iowa statute has granted the right to contract. This is dealt with more at length in considering Division 4 of appellee's argument.

(G) How can it help appellee that "if a contract be doubtful that such doubts should be resolved in favor of the city"? But in construing the law granting cities rights to regulate rates all doubtful expressions of the grant must be resolved against the conferring of the power on the city since it is never presumed that the state intends to grant away its police powers.

Division 4. May power to contract and power to regulate exist at the same time.

This allegation that the power to contract and the power to regulate rates are not inconsistent and may exist at the same time in the same body is argued at length commencing on page 72 of the appellee's brief and the whole contention is based on a

certain quotation from the opinion in Shreveport Traction Co. vs. Shreveport, 47 Southern (La.) 40.

That case is a holding that under Louisiana law the city of Shreveport had a right to enter into a binding contract with a street railroad by the terms of which it might irrevocably (and did irrevocably) fix the prices to be charged or that it might in that contract have stipulated that it might from time to time fix reasonable rates. It is in no sense a holding that where a statute requires a city to fix reasonable rates it can establish by contract a rate binding upon the public utility which is irrevocable though it become unreasonable. The court said in that case, in addition to language quoted in appellee's argument:

> "If a municipality has a power to grant a franchise on condition, it must necessarily have the authority to enter into an agreement binding on both parties. If the railway is bound by the tariff agreed upon, the municipality must be bound. * * * The city * * * had the power to grant the street franchise and to fix the rates of fare by agreement * * * and this contract precluded the municipality from lowering the rates during the life of the franchise."

This is a universal holding where power to contract has been conferred by the legislature. The leading cases are Detroit vs. Railway, 184 U. S. 368, and Cleveland vs. Railway, 194 U. S. 517.

(B) That there is a marked distinction between the power to regulate rates and the power to contract is true and no case can be found which holds that a

municipality can have both, although it is sometimes held that where a city is granted the right to contract the state granting the right may by the exercise of its reserve power modify the contract and even in such cases the courts have held that until the state definitely makes a change the contract exists.

This point is definitely answered by the Iowa court in the cases cited at page 23, Division 5, appellant's brief.

Division 5. Fixing rates in Iowa.

This point was anticipated and covered by Division 3, page 14 of appellant's brief and constitutes nothing additional to what was set forth therein. It is only another way of saying that the appellee does not like the construction placed upon the Iowa statute by the Iowa Supreme Court. It is answered with finality by the decisions cited on page 25 of appellant's brief read in connection with those cited on page 23 of Division 4. The allegation that the ordinance here under consideration does not "allege any attempt to fix unchangeable rates but fixes maximum rates is an unworthy attempt to make a play on words since this court and every other court to which the question has been submitted holds that if maximum rates are fixed by contract neither party has power to change the same.

Division 6. Right to injunctive relief.

If the appellee here means to make a claim that the court lacks jurisdiction of the action, the court's

attention is directed to the record—page 4—appellant's bill, wherein the appellant shows the court that *the value of the right in dispute* is of more than $3,000; and that its proprety is being taken by confiscation in violation of the constitution and to the FOUR—Maclean ffl ffiNztaoin cmfwyz admission in appellee's brief that there is now on deposit the sum of more than $14,000.00.

If it is a claim that this court should not grant injunctive relief against the enforcement of a void rate, it is answered by the citation from the Woodward case above made, and by such cases as the Knoxville Gas case, 261 Fed. 284, where it is specifically held that where a municipality attempted to force a public utility to sell its product at a rate fixed in a franchise ordinance, though the rate provision of the ordinance was not binding in that respect because of the municipality's want of power irrevocably to fix the rate for public utilities, injunction was held to be the proper form of remedy, the court saying:

> "It cannot be necessary to dwell upon the question of jurisdiction. The inevitable result of persistence on the part of the city, through penal ordinance and otherwise, to enforce the price under the prima facie showing made as to existing conditions, would be to appropriate property rights of the plaintiff in violation of the constitutional guaranties it invokes for its protection."

Division 7. Effect of Iowa construction of Iowa statutes.

That the courts of the United States follow state decisions construing local statutes, see in addition to the cases cited in appellant's original brief at page 24 the following:

Williams vs. Eggleston, 170 U. S. 304-11.
Ennis Water Works Co. vs. Ennis, 233 U. S. 652.
Crowley case, 127 U. S. 86.
Balkan case, 154 U. S. 177.
Sacirty vs. Brown, 213 U. S. 25.
Coach Co. vs. New York, 221 U. S. 467.
Old Colony Trust Co. case, 230 U. S. 100.
Williams vs. Gaylord, 186 U. S. 157.
Memphis S. R. Co. vs. Moore, 243 U. S. 229.

In its argument and brief appellee says that the decisions relied upon by appellant have all been decided since the determination of this case except the Jones case. But the cited cases are merely the culmination of a long series of cases and the development of the rule is shown in them to have been established even before the Jones case was decided—and the Iowa rule is in harmony with the decision of this court in construing statutes granting powers to cities and towns. See cases cited in appellants' brief page 25, and the quotation from the Vincennes case on page 64 thereof.

But in any event the decision of the Federal court in this case constitutes no precedent for this court in arriving at its conclusion. That this court

will follow the latest decision of the Iowa Supreme Court construing the Iowa statute is the rule of the Federal Court which is well stated in syllabus of the opinion in Southern Railway Co. vs. Commission, 99 Fed. 162, as follows:

> "The decision of the highest court of the state construing a state statute * * * will be recognized as authoritative by a Federal court * * * and where such court has independently rendered a contrary decision it will be re called if still within the court's control in deference to a later decision of the state court."

This rule was definitely applied in re Floyd & Hayes, 225 Fed. 262. In that case a Federal court was called upon to determine which of two irreconcilable opinions it should follow. The Federal opinion was rendered on Feb. 6th, 1914 and was prior to the decision of the State Supreme Court which was not filed until April 29th, 1914. In rendering decision the court said (page 265):

> "It is the duty of the Federal Court to follow the latest decisions of the State court although it may differ from prior decisions of the latter tribunal. It is likewise the duty of the Federal Court to follow the latest decision of the State court although the Federal Court may have previously come to a different conclusion. * * * Under these decisions it would appear that in the present case it is the duty of this court to follow the decisions arrived at by the Supreme Court of South Carolina. * * *"

That Judge Wade's opinion in the present case does not form a "prior decision by a Federal Court" in any event hardly needs argument. The appeal from the decision destroys its finality (Eastern Building and Loan Association vs. Welling, 103 Fed. at 355), so that it is in no sense res adjudicata and this court following Federal rules should be guided by the Iowa decisions, since as is well said in Southern Railway Company vs. Commission, 99 Fed. 165:

> "It is the practice of the Supreme Court of the United States, whose practice controls all Federal Courts, to adopt the interpretation given by the highest tribunals of the several states to their respective acts of legislature, where such interpretation does not conflict with the paramount authority of the Constitution of the United States, binding on their own courts or with the fundamental principals of justice and common right * * * *In these cases the Supreme Court will change its decision when the highest tribunal of the state has given a different interpretation.*

As before pointed out there is throughout appellee's brief a determined effort to confuse the issue by references to and quotations from cases sustaining contracts where the right to make them is expressly conferred by statute upon the city. Some of the most prominent of these cases have been noted but it is impossible within the limits of a reply argument to analyze and note them all. Nor is any effort made herein to cover by reply the claim for the alleged history of the Iowa statute set out in appellee's brief.

That history the court will find was completely covered by appellant's brief and argument and it was there shown exactly how these statutes originated without any suppression of any kind. The language over which appellee makes such contention was quoted. That the intent of the legislature by the passage of Section 725 was to take away all powers to coneract as to rates is held in the Woodward case, 178 N. W. on page 550, in unqualified terms, and this court is

> "bound to presume that, when a question arose in a state court, it was thoroughly considered in that tribunal, and that the decision rendered embodied its deliberate judgment."
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> Cross vs Allen, 141, U. S. 539, 12 Sup. Ct. 67, 35 L. Ed 843.

Appellant respectfully submits the above answering argument to the court.

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